EQUITY POLICIES IN HIGHER EDUCATION

A LEGAL EVALUATION OF INSTITUTIONAL RESPONSES.

THESIS SUBMITTED BY SOLOMON FAAKYE IN PARTIAL FULLFILLMENT OF THE AWARD OF A MASTER OF PHILOSOPHY DEGREE IN HIGHER EDUCATION.

SUBMITTED TO: THE UNIVERSITY OF OSLO, NORWAY, THE UNIVERSITY OF TAMPERE, FINLAND AND THE UNIVERSITY OF AVEIRO, PORTUGAL.

June 21, 2007

TABLE OF CONTENT

TABLE OF FIGURES

ACKNOWLEDGEMENT:

My greatest indebtedness goes to my main supervisor **Professor Peter Maassen (PhD)** for ably guiding me through a tortuous path when I was still a newcomer warming up in this extensive field. The second goes to my co-supervisor Mr. Amoakohene Kofi (MPhil/Barrister at law(C)); it was his keen interest in my work that sustained my zeal.

The third goes to Professor Seppo Holta of the University of Tampere, Finland. His module on management was a real eye opener in this journey.

The fourth goes to my able private secretary Dorinda Nana Forson. Her able assistance in my most stressful moments can't be paid back.

I am also deeply indebted to my friend, James Kwame Anyarik, the proof reading assistance he gave, despite his heavy schedule, proved to me that he understands the proverb " A friend in need is a friend in deed" .

Mr. Akwasi Deroy was also very helpful by way of encouragement and advice. His high expectations from me have kept me moving on.

Finally and above all, I give thanks to my Personal God, whose mercies are new every morning.

DEDICATION:

Dedicated to my mother, Mrs. Grace Faakye: she took all my stubbornness with a cheer.

ABSTRACT

Higher education equity policies have for as long as they have existed provoked serious legal controversy, especially in the largest system of higher education, i.e. the USA. In as much as these legal troubles have not arisen (yet) in Ghana, it can't be taken for granted that such problems are far-fetched. In that sense this study is a work ahead of its time; in drawing analogies from American case Law, the work attempts to predict the possible legal issues that may arise in the Ghanaian jurisdiction and the possible legal solutions. It does this in the context of the Gender affirmative action policy and the less endowed School policy implemented by the University of Ghana.

To achieve this broad goal, the work proceeded by identifying the main features of these policies, the rationale for their adoption and the procedures for their implementation. Within an analytical framework of the filter model, carved out of the tenets of sociological jurisprudence, the project, using a legal methodology, evaluated the legal merits of these policies against the standards set by the Constitution of Ghana, as well as the Narrow tailoring analysis and Instrumental test evolved by American Jurisprudence.

After carefully examining the legal literature as well as policy documents available, it was discovered that the two policies as implemented are bereft of the crucial standards of fairness and non-discrimination required by the constitution and therefore have weak legs to stand on in Law. It was also discovered that the procedures for their implementation are not sufficiently narrowly tailored to pass the legal test. For these reasons, the work ends by suggesting ways of improving such policies to make them more legally passable.

CHAPTER ONE

1. INTRODUCTION AND BACKGROUND

1.1 INTRODUCTION

From the context of the home of a polygamous Man with competing wives and sets of children, to the office of the admissions board of a University with competing applicants of different backgrounds, the question of who gets what, when, and how, rears its head. Laswell (1950) writing from a system level perspective calls this problem politics, but viewed more closely; this problem represents the sum total of the many struggles we face even in our individual lives.

In the educational context, pressures here and there, for equal opportunities, equal access, and fair treatment have led to the evolution of certain principles by higher education institutions to guide them in their admission decisions. Central to such principles has been the principle of equity. For most institutions, equity behavior offers the most appropriate way of meeting the demands of equality and fairness exerted by society (see for example, Preamble to admissions: University of Ghana Handbook: 2005-2007).

Ironically, the equity measure evolved by institutions has tended to deepen the problem inherent in distributing educational opportunities. The great number of disputes generated in the educational context by equity policies as will be discerned later in this study mirrors this fact. The source of the problem appears to lie in the concept of equity itself – in the name of equity, one stands the danger of "robbing Peter to pay Paul". In providing an answer to this huge conceptual difficulty, the Law provides caveats and a framework within which equity-like policies should be understood and the equity rationale be assessed. For the legal mind, how much one gets, may not be much of a problem as compared to why one gets it, and how one gets it. Put simply, it is the principle of fairness and reasonableness that guides the action that may bother the legal mind. On the contrast, fairness or social justice may guide an equity policy, but not fairness as understood in the legal sense but as understood in the moral or political sense. Springing

from the perspective of Law, this work has the purpose of examining critically the legal basis of the less endowed Schools policy, and Gender affirmative action policy implemented by the University of Ghana. More specifically, the work will legally appraise the objects of the policies and the procedures for their implementation. To achieve this purpose it is important to start with conceptual and legal clarifications.

1.2 THE NATURE OF EQUITY

Broadly viewed, the term equity as used in higher education discourses, represents strategies and procedures for enabling and encouraging groups underrepresented in higher education institutions, and programmes or study areas to be granted access and to exit successfully.

Skilberg et al (2000, p.10) make a very important distinction between equity and equality in the following words: "*Equity does not necessarily connote equality. It does not represent an attempt to use precise measures to ensure fairness – for example fixed mathematical quotas for underrepresented groups or proportional representation although as strategies these may be attempted. Nor does it simply imply uniformity whether of institutional provision or entry and study requirements. On the contrary, it is now widely accepted that rather than sameness, substantial diversity and fitness to individuals and groups and their circumstances are appropriate if the varied needs of students are to be met"*. In sum, Skilberg asserts that equity policy must take into account individual differences and needs.

Also relevant to a conceptualisation of equity has been the concept of access. Equity and access, though complementary and even supplementary, do not connote the same meanings. Equity being a wider concept refers to the nature of access opportunities or procedures and to fair and reasonable treatment including opportunities for underrepresented groups not only to enter, but to progress well in higher education (Ibid). Thus equity represents a package of policies which includes fair access.

In relation to human rights, the concept of human rights provides partly the philosophical and legal justification for the whole point of equity (Turner, 2006). Non discrimination

clauses in human rights conventions have always provided a basis for rationalising equity-like responses. Thus, human rights as a concept are only a tool for ensuring and enhancing equity. For purposes of social science research, Skilberg et al. (2000) advocate that the term equity should serve as an umbrella term for terms such as access, equal opportunity, equality of outcomes, and affirmative action.

Drawing much inspiration from the neat conceptual clarifications by Skilberg et al., this work will view equity as the sum total of policies and procedures for ensuring fair access and reasonable treatment for underrepresented groups in the University of Ghana. Thus, equity is used in relation to policies relating to access. The term equal opportunity as employed in this study will not come with the expectation that all will be treated exactly in the same manner or that there should be precise equality of representation in all areas of higher education, but it will imply being systematically fair to the extent that even when inequalities occur, they will be justified by overall benefits and gains to all concerned.

1.3 EQUITY THEMES IN THE GHANAIAN POLICY LANDSCAPE

The dominance of equity-like themes in the Ghanaian constitutional and legislative framework can't be overlooked. Much of such themes are expressed through the inclusion of non discrimination clauses in legislations or making special provisions for vulnerable groups in society in policy documents.

The **1992 constitution of Ghana** provides a clear illustration of this phenomenon. At Article 35 (6) the following provision is made "*Towards the achievement of the principles of national integration the government should take appropriate measures to achieve reasonable regional and gender balance in recruitment and appointment to public offices"*.

The above clause follows from article 35 (5) which entreats government to prohibit discrimination and prejudice on the grounds of place of origin, circumstances of birth, ethnic origin, gender or religion, creed or other beliefs.

Offering further strength to these provisions is article 17 (2) which provides "*nobody should be discriminated against on grounds of gender, race, colour, ethnic origin religion, creed or social or economic status"*. Beyond the Constitution, the pervasiveness of equity tones in the Law is not far fetched. Notable legislations that carry this policy are among others, the **Education Act (Act 87).** This Act provides at section 1 that "No person shall be refused admission as a pupil at any school on account of the religious persuasion, nationality, race, or language of himself or either of his parents".

The **labour Act of Ghana (2003)** provides further evidence to this trend. At **Section 46** it provides "Special incentives shall be provided to employers who employ persons with disability". Section 2 provides that special incentives shall be given to a person with disability engaged in a business or enterprise. Adding to the above provisions, section 63 provides that a person's gender, race or disability, among other things, should not be a basis for the termination of his or her employment.

1.4 STATEMENT OF PROBLEM

Equity-like policies all over the World have being a source of strong legal, political and social debate. In the American jurisdiction, ever since the decision of the Supreme Court in Regent of the **Univ. of California v. Bakke** stated that a university could take race into account as one among a number of factors in student admissions, affirmative action programs in student admissions and financial aid have come under several attacks. The preponderance of litigation over affirmative action policy can be explained by the fact that it manifestly conflicts with non discrimination clauses enshrined in the constitution.

In the University of Ghana, traditional equity-like considerations were restricted to mature candidates and the disabled (Ofosu, 2006). These groups were admitted under a special admission regime, which allowed them entry under relatively less competitive conditions. However, following the introduction of more controversial equity-like policies, such as the gender based affirmative action policies of the early 1990's and the less endowed Schools policy in 2004, difficult problems can be envisaged. Taking a cue from affirmative action policies in the USA where equal protection clauses provided for

in the 14th amendment have often times been invoked to challenge such policies, one can foresee similar clauses in the Ghanaian constitution being invoked in the future to question the legal basis of such policies. The 14th Amendment to the American Constitution and article 17 (1) of the Ghanaian constitution bear similar language. Article 17(1) of the Ghanaian constitution states: "a) *all persons shall be equal before the law. B) A person shall not be discriminated against on the grounds of gender, colour, race, ethnic origin, religion, creed, or social or economic status".* The fourteenth amendment also asserts equal treatment to all persons irrespective of colour, religion, or gender. It can be inferred that the protection granted by such clauses is not partial, but holistic and thus, relying on such clauses, both advantaged and disadvantaged groups may be able to seek relief in the courts in instances where they are discriminated against in the delivery of social services.

A greater problem is presented by the fact that the courts in Ghana have in recent times shown great activism towards the review of policy decisions and executive decisions of the university. The Case of *Ex'parte Professor Edward Ofori Sarpong,* presented in appendix 1, is illustrative. It is against this background that the present study examines the possible legal challenges that equity-like policies of the University of Ghana may encounter and prescribe possible ways of avoiding such difficulties. Thus, the interest of the present study can be reduced into one specific problem:

How legally valid are the rationale(s) and procedures for implementing equity like policies in the University of Ghana?

1.5 OBJECTIVES OF THE STUDY

From the foregoing discussions, it is clear that the equity rationale and its related concepts find deep expression in the policy agenda of Ghana. Bearing this in mind, the present study will explore the scope of these policies, the rationale for their adoption, the process and procedure for their implementation and more importantly, the legal constraints that such policies may evoke in the future. To achieve these broad purposes the work by way of objectives, seeks to answer the following questions.

1. What are the major features of equity-like policies at the University of Ghana?
2. To what extent are the rationales for these policies legally valid?
3. How legally valid are the procedures for their implementation?
4. In what ways can equity policies be improved?

1.6 SIGNIFICANCE OF THE STUDY

The present academic enterprise will clearly be of both theoretical and practical value. In the theoretical sense, this study represents a novel attempt to explain equity-like concerns in Ghanaian higher education within the framework of a legal methodology.

There exist similar works on equity in Ghanaian Higher education, such as Ofosu (2006), but the approach is based purely on a social science methodology. For this reason, a legal approach to the problem offers a valuable alternative perspective for understanding equity policies in Ghanaian higher education.

Furthermore, the work provides a deeper understanding of the role of Law in social stability and change through an analysis of theoretical discourses on the interface between law and higher education policy. The researcher in this regard, introduces the filter model as another way of conceptualising the relationship between Law and society. Thus, offering a very novel approach to understanding the issues of stability and change in Higher Education.

Also, by way of significance, there exist a paucity of literature that examines legal issues in Ghanaian higher education, by drawing insights from analogous jurisdictions. This is the first of its kind. In that sense, this work provides a useful model for future researchers who will be interested in a comparative study of Ghanaian Higher Education Law.

Even more importantly, Researchers in other developing countries with similar legal systems, similar history, and similar higher education systems: such as Uganda, Nigeria,

and Tanzania can use this study as a starting point for investigating into the possible higher education legal issues that are likely to arise out of the implementation of equity policies in their respective jurisdictions and systems.

Also, in the theoretical vein, this work sets an agenda for an interdisciplinary discussion on the problem of equity in higher education, since it does in many ways combine legal analysis with social science concepts. In this respect, Sociological jurisprudence: a branch of legal thought interested in the interaction between Law and Society provides the analytical model for the study.

In a practical sense, this study will provide a basis for shaping policies on equity in the future. It will do this in three ways. First, it will clearly spell out the various legally problematic features of the Equity policies of the University of Ghana. This will be done by drawing attention to loopholes in the policies, as manifested by the Constitution, Legislation and Case Law. It is strongly contended that clearly identifying the problem, is a key step towards solving the problem.

Secondly, the work will offer suggestions or solutions to the problems envisaged, by providing alternative approaches to the drafting and implementation of these policies, taking into consideration standards required by Law, as well as best practices evolved by other higher Education systems. It is anticipated that these suggestions will be useful to higher Education Institutions in Ghana in the development of their equity policies.

Thus, to make the findings of this work useful, the conclusions of the study will be incorporated into policy briefs and disseminated to the Higher Education Ministry, Higher Education Agencies, Higher Education Institutions, and other Stake holders. These Include but is not limited to: The Higher Education Division of the Ministry of Education, The National Council for Tertiary Education, The National Accreditation Board, The Council for Vice Chancellors and Principals, The University Teacher Association of Ghana, The Polytechnic Teachers Association of Ghana, and the National Union of Ghana Students. In the long run, this work will prevent unnecessary

legal battles that would have arisen in the future as a result of potentially problematic equity policies, thus preventing wastage in the allocation of resources.

1.7 OUTLINE OF THE STUDY

The researcher divided the study into six chapters. The first chapter opened with a general Introduction and Background to the study. In this section, the nature and scope of equity policies in Higher education were explored and their legal implications were generally discussed. Also the term "Equity" and its related concepts were put in its proper context. Chapter one closed with an examination of the purpose and objectives of the Study as well as the Significance of the Study.

The second chapter is dedicated to the Review of relevant literature. The first part will provide an analytical framework for the Study with an emphasis on the filter model as a means for understanding the Relationship between Law and Social Change/Stability. Also in this section, relevant provisions in the constitution of Ghana as well as relevant Case law decisions, largely emanating from the American jurisdiction will be reviewed.

The third Chapter focuses on the Methodology for the study. Here, attention is given to the various tools of statutory Construction, the Case Law approach and Canons of documentary Interpretation. In the fourth chapter, the various equity like policies at the University and their mode of implementation are presented with the aid of tables. In chapter five, the equity policies, of interest in this study, are discussed in the context of information in the preceding chapters. Finally, conclusions are drawn in chapter six and suggestions made based on the analysis and discussions in chapter five.

CHAPTER TWO

2 LITERATURE REVIEW

2.1 ANALYTICAL FRAMEWORK

As a model for analysis, sociological jurisprudence helps us to construe the function of Law in society by attempting to establish a link between Law and Society. Early proponents of this school of thought, such as Roscoe Pound, define Law as a tool for social engineering (Ocran, 1978). Shedding light on what he means by social engineering, he asserts that Law enables just claims and deserts to be satisfied by balancing various social interests (Ibid). In following this thinking, conservative perspectives of the sociological jurisprudence look at how law mirrors or records social phenomena, or how law tinker changes in the legal system in a casuistic manner. A very useful departure from this approach is the Brake – accelerator model offered by Ocran (Burg 1977, p.508). In his conceptualisation, not only does Law defined in a proactive sense tinker changes through case Law, but it can indeed accelerate change through the science of legislation. Illustrating this point further, he asserts that change borne out of case Law is often slow and incremental, but legislation provides a more radical approach to social change (Ocran, 1978).

The function of Law as a brake can be understood in various senses. In Ocran's thinking, the stabilising function of the Law offers the best understanding of Law as a brake. In other words, Law may hinder social change in order to safeguard the legitimate expectations of individuals. The emphasis in this regard is the fact that Law must offer security to people who expect a certain element of social stability to achieve their goals. Ocran refers to the change vs. stability roles of Law as a paradox and prefers that the paradox is resolved in favour of change (Ibid). In his view the preference for social stability by individuals should not override the benefit inherent in overall societal transformation.

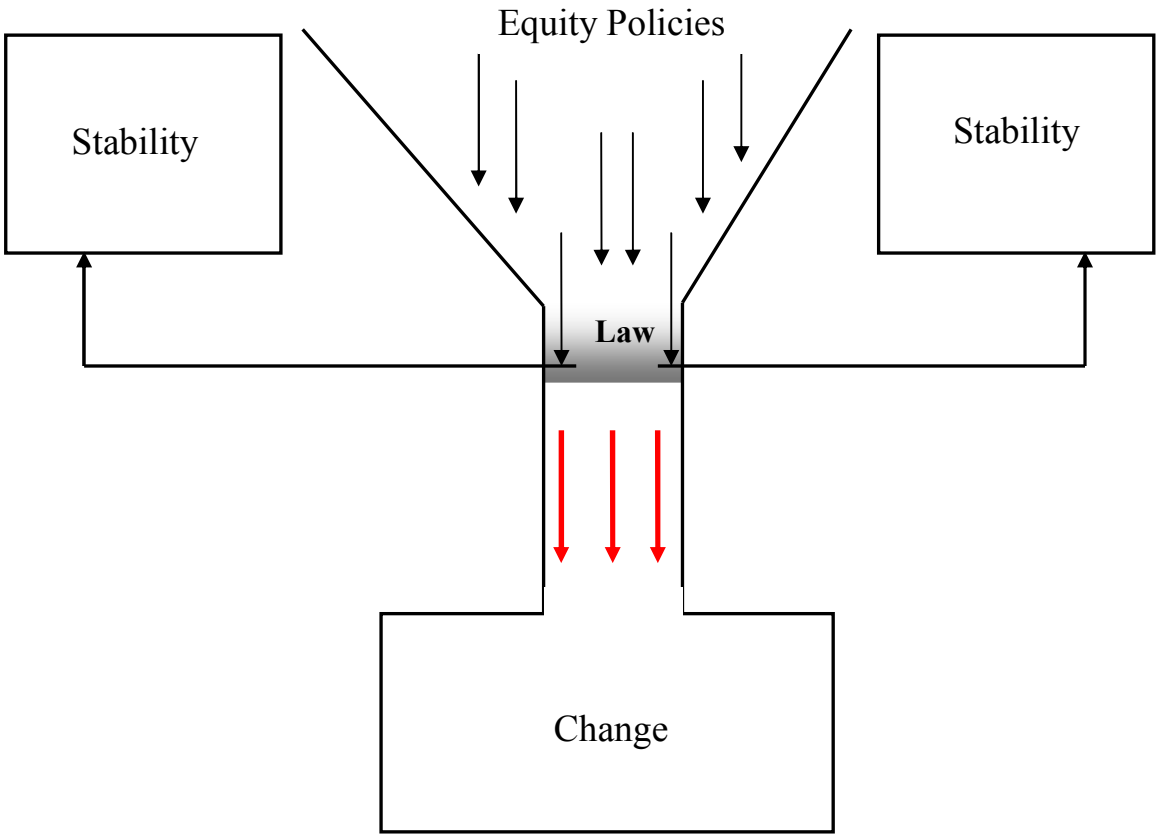
In Said's thinking, the paradox needs rather to be resolved in favour of stability, but not stability understood in the Ocran sense (Said, 1982). To him, in discussing stability, the emphasis must be on the principle of legality as a whole which is a key element of every legal system. This principle expresses certain key ingredients which must necessarily inhere in any legal system and whose absence must automatically trigger a brake of policy or change impulses. Understood in that sense, Said argues that the brake function even becomes more imperative as compared to the change function, not just because it serves individuals legitimate expectations, but because it sustains the foundations of the legal system. Said goes a little further by setting out some of these key ingredients of legality. He notes them as fairness, due process, equality of treatment, non-discrimination and clear standards of behaviour without whim or caprice. These components of the principle of legality in his view must be construed by the courts according to Law. In the context of equity policies, the principle of legality is defined given regard to the rules of constitutional construction and the various tests evolved by the courts.

Drawing particularly from Said's conceptualisation of change and stability, it is possible to predict the behaviour of the courts using a filter model which I propose as an analytical framework for this study. The filter model proceeds on the view that change impulses (policy) from institutions aimed at social change are filtered by a legal test to assess their validity as instruments of social change. The legal test is primarily the principle of legality as construed from the constitution and the narrow tailoring and instrumental tests evolved by the courts through case Law. By this model, whether or not individual goals should take precedence over societal goals or otherwise should be determined by Law. Where the purposes or content of equity policies fail the legal test, the Law shows preference for the status quo ante, therefore the policy is blocked and the system is stabilised. Where the courts condone the merits of a policy, the policy is allowed to effect the changes it carries. This framework assumes that there is a proactive and unbiased judiciary that is ready to subject policies to a rigorous legal test. It also assumes an active civil society which is ready to put these policies to a legal test through the courts. It must be admitted that this model ignores the social and political factors that may or may not influence change and stability. It only looks at Law exclusively as a stabilizer or a change

agent. Social change is used in this context to refer to changes in legal relationships in society, specifically rights, duties and privileges. It must also be admitted that not all forms of changes have legal implications. In other words, not all forms of policies evoke legal issues, and must therefore pass a legal test before causing its intended changes. It is, however, submitted that since equity-like policies touch on rights they necessarily provoke legal issues and must therefore conform to the Law before they can cause their intended changes in society.

Figure 1 attempts to illustrate the relationship between Law and Society within the context of the so-called filter model, developed for this study. In the diagram below, change represents social change and stability represents social stability. Society is defined as any system of human interaction and policy is defined to exclude hard law. The Law in the middle is used to refer to the principle of legality as construed by law: specifically, as construed by the rules of statutory construction, the narrow tailoring test, and the instrumental test.

Figure 1: The Filter Model Showing The Relationship Between Law and Society.



In the model above, equity policies proceed from change agents, in this context the University, directed at causing changes in society. The Law serves as a filter, evaluating the validity of these policies as tools for social change. Policies that fail this test are rejected and that restores the system to the status quo ante, or a state of stability. Change occurs when equity-like policies conform to the principle of legality set out by Law. Change indicators are represented by the red arrows.

2.2 APPROACHES TO EQUITY IN HIGHER EDUCATION

The focus of this section of the work is to plough through the general system and institutional level interventions that are employed in implementing equity-like policies in various jurisdictions.

2.2.1 Legislation and Statutes

By this approach, specific provisions are made in the constitution or in other Legislations, allowing affirmative action policies within Institutions. The Ugandan Constitution, for example, endorses equity-like behaviour of public institutions. Article 33 (5) of the Ugandan Constitution (1995) stipulates "*Without prejudice to article 32 of this Constitution, women shall have the right to affirmative action for the purpose of redressing the imbalances created by history, tradition or custom*". This provision in no small measure provides a Constitutional stamp to affirmative action policies thus making it less likely for such policies to raise legal questions. Article 32 (1) of the Ugandan Constitution further consolidates affirmative action policies.

It states "Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them". This clause serves as a Claw-back excluding the application of non-discrimination Clauses in the Ugandan Constitution to Affirmative action policies.

Other notable cases include the case of India. The 1950 Constitution of India, for example, stipulates up to 15% reservation in higher education for the Scheduled castes (a notable disadvantaged group), and 7.5% reservation for the Scheduled tribes (also a predominant excluded group). In 1951, the First Amendment Act made certain changes in Article 15(4) of the Indian Constitution; the Right to Equality for all citizens was guaranteed (Gupta, 2006). This amendment empowered the state to make any special provision for the advancement of any socially and educationally backward class in India. In the 104th Amendment Bill (93rd Amendment Act) a new clause, 15(5), was inserted into Article 15 of the Indian Constitution that guarantees the "*right to equality*" and "equal protection before law" to all citizens without discrimination (Ibid). The new clause allows the government to reserve seats for the Scheduled castes, Scheduled tribes and other backward classes in private unaided educational institutions except in the minority institutions (Ibid). It also forms the legal basis for extending reservations for the Scheduled castes, Scheduled tribes and other backward classes in all central and prestigious professional colleges up to 49.5% (Ibid).

The Higher Education Act 101/1997 of South Africa, replacing all previous legislation pertaining to higher education, establishes and regulates a single co-ordinated higher education system in South Africa (see: Institute of Education London: Working paper 2). In the Preamble, the Act promotes the redress of past discrimination, ensuring representivity and equal access and promotes the values that underlie an open and democratic society based on human dignity, equality and freedom (Ibid).

It must be admitted that the Legislative approach, despite its clear advantage of providing a strong legal backing to affirmative action policy has its own limitations. Most notably, it makes changes within Institutions dependent on legislative changes. Put differently, in instances where Institutions have to shift their policies to reflect changing social realities, they will have to wait for changes in Legislation before such shifts can be made. Flexibility of Institutional policy becomes even more thwarted when such legislations are entrenched provisions and require cumbersome amendment procedures.

2.2.2 Soft Law Approach

Institutional level equity-like policies are sometimes informed by policy guidelines or policy objectives at the system level, what can be generally referred to as soft Law. A key example is the case of South Africa where equity-like goals as stated in the national white paper and other system level policy documents provided an institutional drive for equity. (See: Education White Paper 3 - A Programme for Higher Education Transformation, 15 August 1997). The White Paper, when addressing the needs and challenges facing higher education in South Africa, identified, inter alia, a key deficiency - that an inequitable distribution of access and opportunities exists for students and staff along lines of race, gender, class and geography. "*This includes gross discrepancies in participation rates from students from different population groups, indefensible imbalances in ratios of black and female staff compared to whites and males and equally untenable disparities between historically black and white institutions in terms of facilities and capacities."* (para.1.4.1) The White Paper envisions a transformed, democratic, non-racial and non-sexist system of higher education (para.1.14). The White Paper also identifies principles that should guide the process of transformation in higher education, i.e. the principles of equity and redress (para.1.18), democratization (para1.19) and development (para1.20). Though not explicitly referring to gender equity, nonetheless gender equity underpins the intent of the Ministry in this regard. Specific reference is made to the replacement of the previously fragmented higher education structure with a single, coordinated system, with the purpose of broadening the social base of higher education with reference to race, gender, class and age. It is intended that such a system will become increasingly representative of the racial and gender composition of the South African population. This document, furthermore, makes provision for the legislative framework of higher education that will be established by the Higher Education Act of 1997 (Para. 3.11). In a nut shell, the document is an expression of the political will for change in higher education. The soft Law approach clearly has the advantage of enhancing Institutional flexibility, in cases where policy has to be changed quickly to reflect changing social realities. Its disadvantage however, lies in its inadequate legal force as compared to Legislation.

2.2.3 Quota Approach

This approach has been employed both at institutional level and system level with the objective of curing the gender imbalance in the composition of students attending higher education. Even though it can come in the form of legislation or soft Law, its main focus is to create a reservation or quotas for a specified group thus, its name. An interesting case study in this light is Sri Lanka. Its national legislation, sanctions a quota policy for admission to higher education Institutions in order to ensure a fair representation of all districts in higher education. Under an All Island Merit Criteria, up to 40 per cent of the available places is filled according to marks obtained by candidates, ranked on an all island basis. Under a District Merit Criteria, up to 55 per cent of the available places in each course of study is allocated to the administrative districts in proportion to the total population (i.e. ratio of the population of the district to the total population of the country). A special quota of up to 5 per cent of the available places in each programme of study is allocated to 13 educationally disadvantaged districts in proportion to population: ratio of the population of each such district to the total population of the 13 districts. (See: Institute of Education London: Working paper 2). The quota approach is seen as a distributional strategy to ensure fairness in the distribution of the national cake.

2.2.4 Critical Mass Approach

The rationale for this approach is similar to that of the Quota. The only point of departure is that whilst the quota sets a fixed ratio of spaces that must be filled by a particular category of a disadvantaged group, the critical mass approach does not have an upper or lower limit. Its objective is simply to ensure by whatever standards a fair representation of the disadvantaged group in every admission period. What constitutes a critical mass may therefore vary from year to year. The critical mass approach appears to have been justified under certain conditions in the case of **Grutter v. Bollinger** which is discussed below. The procedure for enrolling a critical mass may also differ. For example, in Uganda the bonus points system is applied (Chivaura, I: 2000) whilst in Ghana, the cut off points system is used.

2.2.5 Financial Incentives

This approach focuses on the use of financial schemes to correct the imbalance in the representation of various classes or groups in higher education. The incentives are tailored at the disadvantaged group in order to motivate them to participate in higher education. It takes the form of bursaries, grants and loans. In Ghana, for example, special scholarships are given to applicants from less endowed schools to enhance their participation in higher education (UG special reporter, v.44). Though not on a consistent basis, scholarship schemes targeting needy girls have been used in Malawi; in 1987-1988, the Human Resource and Institutional Development project implemented a scholarship scheme for girls in Malawi studying science related disciplines (Mlama, 2001).

As a Conclusion to this section, it must be noted that it is possible to have a hybrid Intervention to the problem of equity in Higher Education. One or two or more of the above stated approaches can be used as equity solutions in Higher Education.

2.3 LEGISLATIVE FRAMEWORK FOR EQUITY LIKE POLICIES IN GHANA

This section does two things. First, it provides a constitutional basis for equity-like policies in Ghana, and second, it attempts to run through the extent of the University powers with respect to the making of equity-like policies.

The constitution of Ghana provides significant rules that bear upon equity-like policies. The preamble to the 1992 Constitution of Ghana in itself espouses the ideals and principles of equity where it states: “We the people of Ghana, In exercise of our natural and inalienable right to establish a framework of government which shall secure for ourselves and posterity the blessings of liberty, equality of opportunity and prosperity…… do hereby adopt, Enact and give to ourselves this constitution”.

The key phrase equality of opportunity, used in the preamble, is worth noting. This standard set by the preamble establishes equity and equity-like concerns as an underlying principle of the constitution. It is, however, worth noting that the constitution does not

define what it means by equality of opportunity. Indeed equality of opportunity is in the practical sense limited by various social, cultural and political realities.

Article 17(2) of the 1992 Constitution of Ghana imposes a duty on the university not to base policies on discrimination. It states, among other things, that a person shall not be discriminated against on grounds of gender, race colour, ethnic origin, religion, creed or social or economic status. The constitution, however, does well to define what discrimination constitutes. At article 17 (3), discrimination is defined as follows:
"*For purposes of this article, "Discriminate" means to give different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinions, colour, gender, occupation, religion or creed, whereby persons of one description are subjected to disabilities or restrictions to which persons of another description are not made subject or are granted privileges or advantages which are not granted to persons of another description*".
What constitutes different treatment is however very problematic and remains a matter for constitutional interpretation. Also, this article has the potential of being useful to both the advantaged and disadvantaged in society. Equity-like policies that tend to favour the disadvantaged in society can be contested as constituting discrimination.

The directive principles of state policy lay down certain values and ideals on which the Constitution is grounded. At article 35(3) and (4) it is provided:
"The state shall promote just and reasonable access by all its citizens to public facilities and services in accordance with Law".
"*The state shall cultivate among all Ghanaians respect for fundamental human rights and freedoms and the dignity of the person*".
However, the directive principles of state policy in themselves are not justiceable and constitute political aspirations, thus the effect of the directive principles of state policy in relation to the assertion of equity-like rights is not well made.
At article 37 of the Constitution, the social objectives of the directive principles of state policy are laid. It is provided that "*the State shall endeavour to secure and protect a social order founded on the principles of freedom, equality, justice probity and*

accountability ……. and in particular the state shall direct its policies towards ensuring that every citizen has equality of rights, obligations, and opportunities before the Law".
The phrases used in the last sentence of this clause mirror the tone and effect of the preamble and therefore suffer a similar fate – They provide a wide room for the judiciary to exercise its discretion.

The Constitution further gives powers to individual citizens to invoke the courts' jurisdiction on matters that bear on equity-like policies.
Article 23 sets out as follows "*Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by Law and any persons aggrieved by the exercise of such acts or decisions shall have a right to seek redress before a court or other tribunal*".. The standard of fairness and reasonableness is further illustrated in article 296 of the Constitution of Ghana which states "*Where in this Constitution or in any other law discretionary power is vested in any person or authority-*

a) *That discretionary power shall be deemed to imply a duty to be fair and candid;*
b) *The exercise of that discretionary power shall not be arbitrary , biased either by resentment, prejudice or personal dislike and shall be in accordance with due process of Law; and*
c) *Where the person or authority is not a judge or other judicial officer, there shall be published by constitutional instrument or statutory instrument, regulations that are not inconsistent with the provisions of this constitution or that other law to govern the discretionary power*."

The combined effect of articles 23 and 296 is to put parameters on the exercise of discretionary power by administrative bodies. In other words, such bodies are to operate within the caveats of fairness and reasonableness in the design of their administrative decisions. The clauses are however short of what constitutes fairness and reasonableness.

Regarding the power to make equity-like policies, legislation exists that empowers the University to make equity-like policies. At section 15 of the 1961 University of Ghana Act, power is conferred on the University to make statutes for the smooth running of the

University. At section 10 of the same Act under the heading general powers of the university council, it is provided "*Subject to the provisions of this Act, the University Council shall have power to do or provide for any act or thing in relation to the University which it considers necessary or expedient in its capacity as the governing body, and the conferring of particular powers on the Council by other provisions of this Act shall not be taken to limit the generality of this section"*.
It is however worth noting that such powers are not immune from the review jurisdiction of the courts as will be discussed later in this chapter.

The University of Ghana in giving effect to section 15 of the 1961 Acts has promulgated statutes to guide it in the running of the University. At section 15 (1) of the statutes of the University, it is provided "*In addition to the functions specified in this Act, the council is responsible for determining the strategic direction of the University, monitoring their implementation, and ensuring the creation and maintenance of an environment that creates equal opportunity for the university regardless of age, disability, ethnicity, gender or creed*".
This provision, like many other similar provisions referred to earlier on, fails to define what constitutes equality of opportunity, and such general terms used in legislation give room for uncertainty and provide a basis for the exercise of wide judicial powers. Also, actions taken under the authority of this enactment can in itself be declared by the Courts to be inconsistent with the constitution and therefore void as will be discussed in the subsequent section.

2.4 CONSTITUTIONAL BASIS OF COURTS REVIEW POWERS AND INDIVIDUAL RIGHTS OF ACTION

The 1992 Constitution of Ghana makes it possible for individuals to invoke the jurisdiction of the courts in any matter concerning his or her fundamental human rights. At article 33(2) it is provided "*The high Court may issue such orders or directions or writs including writs of habeas corpus, certiorari, mandamus prohibition and quo*

warranto, as it may consider appropriate for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights".

In other words prerogative writs can issue against any institution in matters where an individual is able to prove an infringement on his rights to a court of competent jurisdiction. The power of the courts to review administrative and executive functions is further strengthened in subsequent clauses of the constitution.

At Article 141 of the 1992 Constitution of Ghana, for example, supervisory jurisdiction is granted to the high court to review decisions of all lower adjudicating bodies to the extent that such decisions are deemed to be unconstitutional or ultra vires.

At article 126 (4) of the 1992 Constitution of Ghana, the superior courts are vested with the powers to issue such orders as may be and directions as may be necessary to ensure the enforcement of any judgement, decree or order they may give. These orders include habeas corpus, certiorari, mandamus, prohibition, and quo warranto. Such orders are for the purposes of enforcing or securing the enforcement of any of the provisions on the fundamental human rights and freedoms. The courts Act of Ghana bears similar provisions. At section 5 of the Act, it is provided:

"*The Supreme Court shall have supervisory jurisdiction over all courts and over any adjudicating authority and may in the exercise of that supervisory jurisdiction, issue orders and directions including orders in the nature of habeas corpus, certiorari, mandamus, prohibition and quo warranto for the purpose of enforcing or securing the enforcement of its supervisory power*".

The case law is replete with standards that may trigger the courts' powers of judicial review. In the celebrated English Case of **Associated Provincial Pictures Ltd and Wednesbury Corporation**, it was suggested that to qualify for judicial review of an administrative decision, the decision maker must be authorised by public law to make an administrative decision, which had the consequence of depriving a person of some benefit or advantage of which he had been assured that such benefit or advantage will not be withdrawn without first been given an opportunity to advance the reasons why the benefit or advantage should not be withdrawn. On the question of grounds justifying the

grant of judicial review, the court adopted the following criteria "illegality", "irrationality" and "procedural impropriety".

Irrationality was defined as an outrageous decision which defies logic or accepted moral standards which no reasonable person applying his mind to the question for determination would have reached. Procedural impropriety was defined as (a) failure to act with procedural fairness (b) failure to observe the basic rules of natural justice or (c) failure to observe procedural rules expressly laid down by the legislation which has conferred the jurisdiction on the decision maker even when the observance of such failure did not lead to any "denial of natural justice".

The Ghanaian Case of The Republic Versus 1) The University of Ghana 2) The Acting Vice Chancellor University of Ghana. Exparte (1) Prof. Edward Ofori Sarpong (2) Prof. Kwesi Agyeman illustrates one clear instance in which the courts may apply the standards set by the Wednesbury case to review the decisions of the University. The facts of the case as extracted from the head notes are set out below:

Following leakages and alleged malpractices at the University of Ghana in the course of the 2004-2005 academic year examinations, a committee was set up to investigate these allegations. After the investigation, a disciplinary board was set up for senior members of the university. The first applicant Prof Ofori Sarpong was Pro-vice chancellor of the University while the second applicant was head of the philosophy department. The disciplinary board invited the applicants to respond to allegations of misconduct levelleled against them. After their appearance before the disciplinary committee a report was issued by the committee that found them culpable of the allegations. The committee recommended that sanctions be imposed on them. Purporting to act on this recommendation, the Vice Chancellor wrote letters to the first and second applicant dismissing them from the University with immediate effect. In their actions for judicial review of the decisions of the Vice Chancellor, Counsel for the first applicant (Pro-Vice Chancellor) argued that the procedure used by the Vice Chancellor to remove the applicant sinned against section 7(7) of the statutes of the University, which states "The provisions on the removal of the Vice Chancellor shall apply to the removal of the Pro-

Vice Chancellor". At section 6 (19) (b) (c) and (e), the procedure for the removal of the Vice Chancellor is stated as follows:

"A petition for the removal of the Vice Chancellor shall be presented to council and served on the Vice Chancellor and Council shall determine whether the petition merits any further attention - where council determine that the petition raises issues that may satisfy the good cause provisions of 6(19 a) , It shall set up a five member committee to investigate the matters raised in the petition (e) Both the petitioner and vice chancellor shall be given the opportunity to be heard in the deliberation of the committee. (f) Council reserves the right to accept, partially accept, or reject the recommendations of the committee."

The court took the opinion that by dismissing the Pro-vice chancellor without due recourse to the proper procedure stated in 6(19) it clearly sinned against the statutes of the University of Ghana and therefore triggers a review on the part of the Courts.

Regarding the second applicant, Section 40 and 23 of the University statutes states that disciplinary action for senior members must issue from the academic board of the university and not the Vice Chancellor. By the Vice chancellor therefore, arrogating to himself the power to dismiss senior members of the university without the concurrence or sanction of the academic board, it sinned against the relevant sections of the University statutes.

The court made the following observation to support it stance "*It is this courts view that by purporting to consider the decision of the disciplinary board endorsing their recommendations and applying the sanctions, the Vice chancellor was obviously acting ultra vires, he usurped the powers reserved to the academic board: short circuited the procedure, and thereby deprived the second applicant the chance of having his case reviewed by the appropriate body. This would therefore fall under justification for the grant of judicial review on the rounds of procedural impropriety. In order not to sound repetitive I will say that my discourse on procedural impropriety and the authorities cited when discussing the removal of the first applicant Professor Ofori Sarpong applies equally to the second applicant."* This tone assumed by the court expresses clearly the

sanctity that the courts attach to natural justice principles even in the face of University autonomy.

Does it therefore mean that the court will be inclined towards reviewing every university decision or policy? Can the University oust the jurisdiction of the court on certain issues that are of purely an internal nature, or are purely policy decisions? Is the court a veritable octopus stretching its hands and legs everywhere? The answer to these questions is not a simple yes or no. There have been instances where the courts have simply refrained from intervening in the purely internal decisions of the university.

In the case of *Regents of the University of Michigan v. Ewing*, for instance, the USA Supreme Court concluded that "*it was ill equipped to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public education institutions – decisions that require an expert evaluation of cumulative information and are not readily adapted to the procedural tools for judicial decision making*."
Similarly, in the case of Grutter and Bollinger, which will be discussed in detail below, the court noted that it was ill equipped to ascertain "*what race neutral alternatives will allow an institution to assemble a highly qualified and richly diverse academic class*".

These decisions appear to support the sometimes hesitant approach that the court may adopt in its review of the internal policies of the university. It is however important to understand the Ewing case in its context. Administrative decisions that are purely of a professional nature can be distinguished from ones that entangle legal issues such as fairness, equity, etc. For example, deciding on which student's statement of purpose is most qualified for admission may fall in the former category and is a purely professional act. On the other hand exercising discretion as to which group of students male or female should be granted financial incentives for their education is another kind of decision which might evoke legal issues, to which the court will not necessarily apply the Ewing formula.

2.5 ATTITUDE OF THE COURTS TOWARDS EQUITY LIKE POLICIES.

American courts have on a case by case basis attempted to evolve useful guidelines for the evaluation of equity-like policies. In their evaluations, the courts have paid much attention to the purpose of the policy, and the procedures for its implementation. Below is a discussion of the outstanding approaches developed by the courts in their evaluation of such policies. Cases involving Race and gender are presented in tandem in this section because: (1) these two issues appear ejusdem generis in non-discrimination clauses and are therefore likely to be understood and constructed in the same manner (see for example: Article 17(2) and (3) of the 1992 constitution of Ghana), (2) they evoke similar issues (group rights concerns versus Individual rights concerns) in litigations.

2.5.1 Narrow Tailoring Test

In applying this test, what the court seeks to do, is to ensure that the so-called equity-like policy places as light a burden as possible on non-beneficiaries. The seminal case of Regents of University v. Bakke constitutes one of the earliest formulations of this approach. The facts of the Bakke Case, in so far as material are presented below:

Bakke filed suit claiming that minority candidates with lower qualifications had been admitted to medical school under a program that reserved spaces for “disadvantaged” applicants.

The California Supreme Court ordered the school, the State-run University of California, to admit Bakke. The university then appealed to the United States Supreme Court. A divided Supreme Court affirmed the judgment ordering Bakke's admission to the medical school of the University of California at Davis and flawing the school's special admissions program. However, the Court did not stop the school from considering race as a factor in future admission decisions. Justice Powell delivered the Court’s judgment. Four justices agreed with his conclusions as to the Bakke case, and four other justices agreed with the ruling as to use of race information in the future.

The court stated clearly that a university could take race into account as one among a number of factors in student admissions for the purpose of achieving student body diversity. The words of Justice Powell in the judgement appeared to indicate that the university admission policy could not survive scrutiny because it has a quota component. Thus diversity is not being used as one among several factors but a sole factor. It is important to note the following statement of Justice Powell: "the university's interest requires[s] a sufficiently diverse student body and . . . [while] fixed racial quotas and racial balancing are not necessary to achieving that goal, the consideration of an applicant's race during the admissions process necessarily is."

It is clear from the statement above that clear caveats have been provided as to the procedure by which the equity-like policies should be implemented. The diversity rationale from the stance of this judgement can only be justified within the framework of an admission procedure that allows for the consideration of other factors.

The first Hopwood decision presents a more explicit application of the narrow tailoring analysis:

Four white applicants to the University Of Texas School Of Law filed a case in federal district court alleging that the Law School's admissions policies were unconstitutional. Plaintiffs claimed that the Law School's policy of placing black and Mexican-American applicants in a separate applicant pool and admitting members of those groups over non-minority applicants with similar records sinned against the equal protection clause of the Fourteenth Amendment. The district court held that separate evaluations for minority applicants were unconstitutional because they were not **narrowly tailored to the state's compelling interest in diversity and in overcoming past discrimination**. The court also held that giving minority students a "plus" is lawful, but was concerned about a separate standard for minorities and non-minorities. Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Tex. 1994) (Hopwood I).

The first Hopwood decision points to the fact that the diversity rationale in itself must not constitute too much a consideration in the admission process so as to blur the significance

of other factors. Thus using separate criteria for different categories of students amounts to giving too much weight to the diversity criteria while other significant factors are ignored.

In Johnson v. University of Georgia, a very radical decision by the District Court once again exposed the possible legal crevices in affirmative action schemes based on race and gender. This was a consolidated action by four white female students who pleaded that their application for admission has been rejected because of their gender and race. District Judge Edenfield, issued a ruling finding that the university admission policy was unconstitutional. The court ruled that under the equal protection clause diversity does not rise to a level of a compelling state interest because 1) There is no evidence that significant educational benefits can be collected from racial and gender diversity 2) There are no principled stopping points for taking race into account, and 3) that the argued compelling interest is based on stereotypes-namely that race and /or gender are a proxy for viewpoint or experience.

In confirming the decision of the district court, the eleventh Circuit Court of appeals issued a decision setting out a criterion within which a narrowly tailored diversity policy must fall. These criteria are provided below in the form of questions:

1) Whether the admission procedure uses race and gender in a rigid or mechanical way.
2) Whether it fully takes account of race/gender neutral factors which may contribute to a diverse student body
3) Whether the policy gives an arbitrary or disproportionate benefit to the members of the favoured class and
4) Whether the school has genuinely considered and rejected as inadequate, race neutral alternatives.

In the two Michigan cases discussed below, we see a much detailed exposition of the narrow tailoring analysis used in the Johnson case above in the Supreme Courts discussion. The facts of the case in so far as material are discussed below:

In the fall of 1997, two class action lawsuits were filed by the Center for Individual Rights on behalf of white students denied admission to the University of Michigan's undergraduate and law school programs. (Gratz v. Bollinger, et al. and Grutter v. Bollinger et al.) The suits alleged that the University utilizes different standardized test score/grade-point average standards for white and minority students, but the University countered that race is only one among a number of factors taken into account in its admissions processes. The admission guidelines assigned points to applicants for academic and non-academic factors, including race. The University asserted that the new system maintained its commitment to affirmative action and was under development before the lawsuit. The Center for Individual Rights (CIR) faulted the new system for making race too large a factor in admissions.

The case was finally considered by the US Supreme Court as consolidated cases and the court decided as follows:

The Court issued its Grutter decision first--a 5-4 decision written by Justice Sandra Day O'Connor. In it the Court endorsed Justice Powell's decision in Regents of the University of California v. Bakke, *finding diversity in higher education to be a compelling state interest and upholding the law school admissions program*. The Court noted the individuality of the review in the law school, and held that "**race can be considered as a "plus" factor in admissions if it is considered in the context of a "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."** The court particularly observed that the narrow tailoring analysis paid particular respect to the educational judgement and expertise of the Law school's faculty and admissions personnel.

Prior to the case getting to the Supreme Court the sixth circuit had heard the case and had in its judgement made a very important distinction which is worth mentioning. The distinction was made **between a quota based policy and a policy that only aimed at enrolling a critical mass of disadvantaged people**. The Court stated that any system aiming at diversity will have some bottom and top number of minorities, and simply

having an approximate range of minority students who are admitted each year does not turn the pursuit of a critical mass into a quota system.

In contrast, however, the concurrent case of Gratz and Bollinger yielded different results. In a 6 to 3 decision, the Michigan undergraduate admission policy was struck down. The court found that the award of 20 points out of 150 to underrepresented minority applicants solely because of race is insufficiently "**narrowly tailored** to achieve the interest in educational diversity that respondents' claim justifies their program."

It appears from the decisions above that the narrow tailoring analysis applied by the courts, gives consideration to the following factors:

a) Whether or not separate procedures, tracks, criteria or standards were used in the admission procedures for different categories of students as in the case of the first Hopwood decision.

b) Whether or not the number and weight of affirmative action related criteria was too large as in the case of Gratz v. Bollinger.

c) Whether the affirmative action programme sufficiently considers another means of achieving the same goal.

2.5.2 Instrumental Test

Under this test the court looks into the purposes of the policy. By so doing, it attempts to answer the questions: Does a problem exist in fact? If so, does the equity policy actually solve the problem? In applying this test, the policy rationale of remedying past discrimination has often being a subject matter of judicial discussions. The presentation below looks at how this test has been applied by the courts in the context of the "discrimination rationale".

2.5.3 Remedying Past Discrimination

In the famous Bakke case, Justice Thurghood Marshall justified this rationale when he observed: "*Race could properly be considered in an affirmative action program, a policy*

of taking positive steps to remedy the effects of past discrimination. ……In the light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society. I do not believe that the Fourteenth Amendment requires us to accept that fate."

The above observation appears to have received a further judicial endorsement in the Sixth Circuit ruling in the University of Michigan case in which it stated, among other things, that black and Hispanic students can intervene in the lawsuits to argue that the university needs affirmative action policies in place to remedy its own racial discrimination.

In the first appellate decision by the fifth circuit in the Hopwood II case, the court laid down limitations of this rationale. It observed: "**the applicable discrimination cannot be in the system in general, or the University as a whole, but must be specifically at the Law School"**. In other words, this rationale can't justify the blanket application of equity-like policies throughout the whole system.

In Podberesky v. Kirwan, a more complex approach was adopted by the courts in evaluating the above rationale. In that case, a Hispanic student challenged a merit-based scholarship program that was reserved solely for African-American students. The university of Maryland established the plan as part of a desegregation plan to comply with the Civil Rights Act of 1964 and as a way to attract and retain minority students. **The court held that race-conscious remedial measures are constitutional only if there is strong evidence that remedial action is necessary, and that the action is narrowly tailored to meet the remedial goal**. While the university argued that the program was designed to remedy past discrimination, the court disagreed, and held that the program was not narrowly tailored. The court ruled that it is not permissible for a college to rely on a poor reputation in the minority community or a racially hostile environment to show that the effects of prior discrimination are continuing. It stated "**unless the college shows that this environment was caused by its own past actions and is not the result of general societal discrimination".** The Podberesky case appears

to place a firmer limitation on using the above rationale to justify affirmative action policy. This is because not only does it require the institution to point to general trends of discrimination in the society, but it also requires of the institution to point to its specific contribution to the discrimination in the past.

Also, in other jurisdictions and educational contexts, the above rationale has been very useful in justifying equity-like policies. A judicial stamp was given to affirmative action by the Indian Supreme Court in a 1963 historic decision. The Case, titled: *Indira Sawhney vs. Union of India*, represented a comprehensive discussion on the scope and purposes of affirmative action policies in India. In its analysis, the Supreme Court of India made a very interesting differentiation within the socially disadvantaged group.

The court submitted that even where equity-like policies are targeted at a group or a class, belonging to the class perse is not a sufficient condition to benefit from the scheme. A prospective beneficiary must necessarily bring himself within the rationale or purposes for which the equity policy was instituted (Ibid). The court further upheld a 27% reservation for the so-called "Other Backward Classes", but subject to the exclusion of the "creamy layer" or "socially advanced persons/sections of the OBCs". Included in the "creamy layer" were the children belonging to Class I and Defense Officers and children whose parents had an income above Rupees 100,000 per annum. This limit was further revised in 2004 and extended to Rupees 250, 000 (Gupta, 2006).

The New Economist examines the above rationale for equity-like policies and does an interesting critique of these policies in the following words "The goal of reservation in India has been to bring about an improvement in the welfare of those who, historically, have been economically and socially depressed. But in arriving at this judgment about who should be eligible for reservation, the criterion has been a person's caste rather than his or her income or wealth. Consequently, groups belonging to what Article 115 of the Indian Constitution calls "socially and educationally backward classes" have benefited from reservation even though, in practice, many of these groups could not be regarded as "backward".

This has meant that many of the benefits of reservation have been captured by well-off groups from the depressed classes (for example, chamars from the SCs) while poorer groups from the depressed groups (for example bhangis from the SCs) have failed to benefit" (New Economist, December 19, 2005). The above Observation exposes how group tailored equity policies may as well fail to achieve its intended outcomes.

2.5.4 Overview of Chapter Two

The chapter opened with a discussion of the filter model as an analytical framework for the study. The core of the subsequent sections focused on the legal aspects of the filter model or what is referred to in the model as Law. To this end, section 2.3 attempted to examine the principles of legality as enshrined in the 1992 constitution of Ghana focusing on non discrimination and fairness clauses and its possible effects on equity policies. Also, section 2.4 did a general discussion of the review powers of the Courts.

Examined closely, the section affirmed the capacity of the Ghanaian Courts to act as a block where principles of legality are ignored in policy making. Thus, the section provided strong support for the filter model. In the final sections of the chapter actual judicial practice in relation to equity policies were examined. The two other important elements of the "Law" namely the narrow tailoring analysis, and the Instrumental test, as evolved by American jurisprudence were discussed. It became obvious that American Courts have applied a strict scrutiny approach to such policies.

CHAPTER THREE

3. METHODS AND APPROACHES

In line with the objectives of the study and the interest of the researcher, it is necessary that three major sources of data are analysed: Statutes, Case Law or simply put decisions of judges, and policy documents. To successfully do this, the legal method will be employed. Three main reasons justify the adoption of the legal method.

1. The method provides a mechanism for analysis and interpretation of judicial decisions as well as relevant legislation.
2. It provides a standard for understanding the possible interpretation that the courts will give to university policies.
3. It enhances the researcher's ability to predict the possible behaviour of a Ghanaian court faced with equity-like questions that relate to higher education.

Bearing in mind the above stated reasons and the objectives of this enterprise, the present discussion will specifically focus on:

a) Rules of statutory interpretation: This will enable the researcher to take into account the possible considerations that will inform the interpretation of non-discrimination clauses in the constitution and other legal documents.
b) Relevant case law: This will enable the researcher to draw relevant analogies from existing judicial decisions so as to effectively predict the behaviour of the courts when similar cases emerge.
c) Rules of documentary interpretation: This will enable the researcher to construct the meanings and implications of policy documents using the appropriate canons of interpretation that the courts have devised. The overall effect will be to extract the rationale for such policies using the judicial standard.

Hereunder is a detailed discussion of the three main facets of the legal method that would be employed in the present study.

RULES OF STATUTORY INTERPRETATION

Statutes, in the view of Farrar (1977) are the result of political bargaining arrived at through the adjustments of various social interests. In his view therefore, statutes must necessarily be intelligible because they must reflect social reality and consensus. Nevertheless, statutes are often time encumbered by the problems of the dynamism of language. Thus, without canons of interpretation, statutes may fall victim to irrational judgements and interpretations. Interpretation canons provide at the level of generality a framework for resolving the problem of semantics which may flow out of legislations.

In the discussions that follow, the most notable canons of interpretation as identified by Buta (1995), a Ghanaian publicist, will be of interest. They are identified and discussed below.

(1) Ascertaining the legislature's intention: According to this approach, the legislature sets out to find the broad aims of a particular statute or the intended meaning or purpose of a particular statute. In *Rugby water Board v. Shaw'Fox* (1973) Lord Simon of Glaisdale described the position as follows "*The task of the courts is to ascertain what was the intention of parliament, actual or to be imputed, in relation to the facts as found by the courts. There are a number of established canons of interpretation to assist the courts in ascertaining and applying the parliamentary intention. These canons have two aspects: first, as a code of communication whereby the draftsman signals the parliamentary intention to the courts and secondly, as the quintessence of what experience has found to be the best guide to parliamentary intention".*

These two elements of interpretation canons identified by Glaisdale are illustrated as follows. In the first instance the courts may pay attention to reports of parliamentary proceedings prior to the passing of the bill, memorandum to the bill or other preparatory materials. The second instance relates to parliament's own usages, customs and traditions. Useful as it may seem, the above approach appears to present serious problems as a rule of construction. One big criticism for example is: Who is to be taken as the legislature for this purpose? Is it simply the majority of the people present who voted for

the whole bill? Is it meaningful in any event to talk about their intention? When is the intention supposed to be ascertained – Is it at the date of the passing of the Act or can it be regarded as a continuing matter so that the words used can be understood in their current usage. These difficulties presented by the above approach make it less full proof as a tool for predicting the behaviour of the courts in the context of our discussions.

3.1.1 The literal rule

In *R v. Inhabitants of Ramsgate,* Bayley J, describes the literal rule in the following words "*It is very desirable in all cases to adhere to the words of an Act of parliament, giving to them that sense which is their natural import in the order in which they are placed."*

Thus, the literal meaning rests on the premise that there is generally a plain meaning and that it is the courts' function to give effect to it even though the result is absurd or unjust. The courts who adopt this approach emphasise that the remedy against such absurdity or injustice lies in the hands of the legislature. Suitable as this approach may seem, it fails to take account of the appropriate context in which the law was made. It also fails to adjust the law to social realities and purposes.

3.1.2 The purposive approach

This approach emphasises the instrumental nature of judicial interpretation. It proceeds on the assumption that judicial interpretation should reflect those constitutional ideals and values, such as the rule of law, human rights, constitutionalism, and the wider notion of development. A broad conclusion is reached that the purposive approach to constitutional interpretation appears to have gained ascendancy and that the supreme courts tend to spurn results that are suppressive of fundamental human rights (Law Faculty publication, 2006). The purposive approach is however not without problems as it fails to answer the questions: Whose purposes should the law serve, who defines those purposes? And who determines those purposes?

As a Conclusion to this section, it must be noted that notwithstanding the relative strengths and weaknesses of each of the approaches presented above, they individually

offer useful guidelines to the Ghanaian Courts in the exercise of their Interpretation function.

3.2 CASE LAW ANALYSIS

Analogies: By this method, the work proceeds on the basis of a number of points of resemblance of relations or attributes between cases. In large measure, conclusions will be based not just on the number of attributes or relations which are found to exist in common, but also and more particularly on the relevance and importance of such attributes or relationships. Note should be taken of the fact that law being normative proceeds on the fact that because I know X and Y resemble each other in these ways, they ought to resemble them in every way and this should be governed by the same rule or principle. John Stuart Mills pointed out that the use of analogies in the sciences serves as mere guide post pointing out the direction in which more serious investigation should be done (Farrar:1977). In Law however, the process concludes not with an inference based on probabilities and further investigations, but with the use of the resemblance as a basis of a normative step. – The application of the old rule to the new case.

In using the method of analogy, it is important to note that analogies will not only be drawn from Ghanaian cases, especially in instances where litigation has not arisen over the matter in the Ghanaian jurisdiction. For example, section 54, (7) of the Courts Act, 1993, provides that decisions from other jurisdictions may be of importance to the Ghanaian courts in the exercise of their interpretation function. For purposes of clarity, the entire provision is reproduced below:

"*subject to any directions that the supreme court may give in the exercise of its powers under article 132 of the constitution in the determination of any issue arising from the common law or the customary law, the court may adopt, develop, or apply such remedies from any system of law whether Ghana or non Ghana) as appear to the courts to be efficacious and to meet the requirements of justice, equity, and good conscience*".

Illustrative of this trend is the clear reliance of the reasoning in the American Constitutional case of *Marbury V. Madison* in the Ghanaian jurisprudence. In *NPP v.*

Attorney General, for example, the learned Ghanaian judge Adade (J.S.C.) quoted copiously the following extract from Marbury and Madison.

"*It is true that in the instance before us the interpretation of the court is not sought to enforce action by the executive under constitutional legislation but to restrain such an action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference in the exercise of executive discretion".*

Thus as can be clearly seen, reliance on decisions from analogous jurisdictions is an accepted practice by the Ghanaian courts sanctioned by legislation. To this end, this study will draw analogies from decisions in the American jurisdiction to the extent that they are useful to the study.

Another critical aspect of the case law technique to be used in this study is the fact that analogies will be drawn precisely from the *ratio decidendi* of the cases and not other extraneous material of judges such as the *obiter dicta*. What the *ratio decidendi* constitutes is presented in the next sub section.

3.2.1Ratio Decidendi: It has been described as any rule of law explicitly or implicitly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him, or a necessary part of his directions to the jury (Lloyd, 1972). It is simply defined as the reason or the reasons for the decision or as the underlying principle of a case which forms its authoritative element.

Professor Goodhart attempts to provide some guiding principles for spotting the *ratio decidendi*. The guide lines are as follows:

<u>Good hart's List</u>

1. The principle of the case is not found in the reasons given in the opinion.
2. The principle is not found in the rule of Law set forth in the opinion.
3. The principle is not necessarily found by a consideration of all the ascertainable facts of the case, and the judges' decision.

4. The principle of the case is found by taking account of the fact treated by the judge as material and his decisions based on them.
5. In deciding the principle it is also necessary to consider what facts were held to be immaterial by the judge for the principle may depend as much on exclusion as it does on inclusion. (See: Farrar, 1977).

It appears that in cases where the Interpretation of a statute was the issue or among the issues in a previous case, the court may apply the ratio in that previous case to a new case, so as to escape the difficult work of interpretation. In that instance there is a precedent on the interpretation of that particular statute so the court applies the precedent unless it is not bound by it as shall be discussed below.

*3.2.1 **Stare decisis***

It refers to the detailed ground rules governing which courts bind which other courts in the legal system. In Ghana this is explicitly laid down by the 1992 Constitution and the Courts Act 1993. The stipulation simply put spells out three superior courts of judicature namely: The Supreme Court, the appeal court, and the high court with the Supreme Court being the highest, followed by the appeals court and the high court. A decision of the Supreme Court binds all other courts and must be given the utmost priority when any court resort to case law. The Supreme Court is not bound by its own previous decisions. In the absence of a decision of the Supreme Court on a matter, the decision of the court of appeal, binds all other courts below the court of appeal more precisely the high court and inferior courts. Likewise, decisions of the high courts, by way of precedence, binds all inferior courts notably circuit courts, and district courts and tribunals.

Not only do the Ghanaian courts rely heavily on the priority of courts in their judicial interpretation, they also rely heavily on the priority of laws. Article 11 of the Ghanaian constitution lays down the hierarchy of laws as follows:

"*The laws of Ghana shall comprise*

a) The Constitution

b) *Enactments made by or under the authority of the parliament established by this Constitution.*
c) *Any orders Rules and regulations made by any persons or authority under a power conferred by the Constitution*
d) *The existing law*
e) *The common Law."*

The hierarchy above with the Constitution being the highest and the common law (largely case law, or judge made law) being the lowest, determines which law should be given priority when there is a conflict between the various sources of law outlined above in the legal system. Thus in line with this hierarchy, article 1 of the Ghanaian Constitution outlines "*The Constitution of Ghana shall be the supreme law of Ghana and any law found to be inconsistent shall according to the level of its inconsistency be declared void"* (1992 constitution of Ghana)

3.3 CONSTRUCTION OF DOCUMENTS

In order to be able to achieve the objectives of this enterprise, another very important task of the researcher will be to predict the possible interpretation that will be accorded to policy documents having an equity-like rationale. This calls for an application of canons of documentary interpretation.

In the Ghanaian case of *Biney and Biney,* the court of appeal laid down three basic rules of construction of deeds and documents namely:

a) The construction must be gathered from the written document itself.

b) The construction must be near to the intention of the author as the law will permit.

c) Technical words of limitation will have their strict legal effect.

Bimpong Buta (1995) after following closely recent decisions adds a fourth:

d) The document should be read as a whole so as to arrive at the true intention of the maker.

The above outline is discussed below in seriatim

a) The intention must be near to the mind and intention of the maker: The court must discover the true intention of the maker of the document and thus arrive at an interpretation that gives the document its real meaning. Consequently, if the courts find that the literal meaning of the words used would lead to absurdity, repugnancy or inconsistency, the court can modify the literal meaning so as to avoid absurdity and thereby reach an interpretation that will effectuate and will not defeat the author's true intention.

b) Intention must be gathered from the written document itself: This implies that we must look at the written expression of the maker of the document to ascertain the intention. The court must thus give effect to the intention as expressed; not what was intended to have been expressed. The court cannot as it were think for the parties and substitute the presumed intention for the expressed intention.

c) Where words of limitations are used, it should be strictly construed: This applies mainly to the construction of deeds and therefore is not of much relevance to the present discussion.

d) The document should be red as a whole: This point appears to have gained ascendancy in the construction of documents (Buta, 1995). It simply implies that the document should not be construed clause by clause or chapter by chapter but should be read together to ascertain the overall rationale or the underlying purpose of the document (Ibid).

3.4 LIMITATIONS OF THE STUDY

A clear limitation of this study lies in its nomothetic approach. In that the study is not based on an empirical understanding of the problem but on secondary data. It is therefore possible that there may be a gap between the information in policy documents and the real issues on the ground. In that regard the study addresses the problem at the level of generality but does not tackle specific issues that would have arisen out of a more practical case study.

Secondly, the work is limited by the fact that it is based on an institutional case study. This limits the extent to which generalisations could be made from the conclusions of the study. Thus attempts at generalisations will have to take into account the uniqueness of the setting of the study.

Also, data had to be gathered in pieces because relevant data needed for the study was scattered in various sources. There is no comprehensive database on University of Ghana equity policies. Thus, the author had to comb through minutes, books, administrative files, reports, official statements, etc. It is submitted that some of these sources are informal and could be contested as representing the final policy position of the University.

The researcher also admits that there is a paucity of case law so far as equity-like issues in Ghanaian higher education are concerned. Much of the case law based on which equity-like issues will be discussed is based on the American jurisdiction. Even though this approach is legally justified, there may be strong methodological arguments that cast doubt on this approach. For example, the cultural understanding of equity as well as equity needs in the United States society may not necessarily be the same in the Ghanaian society. Also, policy considerations that inform the court decisions in the United States may be different from that of Ghana. However, notwithstanding the clear methodological weaknesses of such an approach, analogies from the USA jurisdiction provide at a general level a framework for understanding the possible behaviour of the Ghanaian courts within the framework of equity-like policies.

Another limitation of the study lies in the complexity that flows from establishing a relationship between Law and society. The complex nature of social reality does not always lend itself to a quick evaluation with rules or a set of rules. Equity in the social context has so many policy dimensions which may not necessarily reflect themselves in rules of Law.

3.5 CHAPTER OVERVIEW:

In this chapter, the various tools that will be used in the analysis and discussions were identified. Moreover, the rules of statutory and documentary construction as applied by the Ghanaian Courts were identified and discussed. The method of analogy as a means of arriving at judicial conclusions was also considered. The object of these discussions was to provide an idea of how equity disputes will be analysed and examined by the Courts, and the considerations that may guide the Courts in arriving at conclusions. The chapter ended by outlining the limitations of the study.

CHAPTER FOUR

4. CONTENT OF EQUITY POLICIES

This section seeks to present the various equity policies that exist at the University of Ghana within the context of the admission policies of the University. Data presented is restricted to undergraduate admissions for two reasons. First, undergraduate admissions constitutes 97.71% of all admissions to the University of Ghana (see: University of Ghana, Basic Statistics, 2006) and second these policies have not been applied to graduate admissions at the University (Ofosu, 2006). The emphasis will be on the rationale(s) for these policies as well as the procedures for their implementation.

To effectively do this, the section commences with a presentation of University of Ghana's admission policy.

ADMISSION REGIME

The admissions board at the University of Ghana is responsible for conducting all categories of admissions into the university. Section 41 of the university of Ghana handbook expresses this in clear terms as follows:

"*The admissions board shall be presented with a list of all candidates for admissions for the board to decide which candidates may be offered admission and to which subjects… candidates who do not satisfy the admissions requirement are not eligible for admission and may not be considered by the admissions board".*

To be presented to the admissions board, a person must have filled a University application form and must have satisfied the minimum admissions requirements. Two separate streams of admission are conducted by the academic board: the regular admissions, and the special admissions.

4.1.1 Regular Admissions

Regular admissions as can be inferred from regulations 3:2:1 of the university handbook refer to admissions conducted, based on merit in the West African Senior Secondary School Certificate Examination (WASSCE) or the Senior Secondary School Certificate Examinations (SSSCE). A total aggregate of 24 in the above named examinations has been set by the University as the minimum requirement for admission into the University of Ghana. Details of admission requirements for regular students are set out in regulations 3:2:1 as follows: passes in three subjects, i.e. English Language, Mathematics, and Integrated science, and three elective subjects. Additionally, science and engineering students are required to pass core social studies at least at grade E and non science students are required to pass integrated science at least at grade E. The aggregate score for the core and elective subjects should not exceed 24.

At section 3:2:2 of the university handbook, a pass in the senior secondary school examinations is understood to mean a candidate's performance at grades ranging between A and E, and is interpreted as follows:

SSCE	WASSCE EQUIVALENT
A……1 ……Excellent	A1
B……2…….Very good	B2
C……3……..... Good	B3
D……4……Credit	C4, C5,C6
E…….5…….Pass	D6, D7, E8
F.....Fail.....F9	

It must be reiterated that the cumulative aggregate of the applicant based on six subjects (Core and electives) should not exceed 24.

Cut-off points

The University of Ghana irrespective of its minimum entry requirements sets up a minimum cut-off point for each admission year. A cut-off point is necessary because the number of students who meet the minimum entry requirement each year outruns the number of places available. For each programme, the extent of competition determines the cut-off point. To illustrate this trend the cut-off points for the 2005-2006 University of Ghana admissions are illustrated below:

BSc (Administration)	**-**	***Aggregate 7/8***
BSc (Agriculture)	**-**	***Aggregate 16***
BSc (Science):		
Biological Science	**-**	***Aggregate 12***
Mathematical Science	**-**	***Aggregate 13***
Bio-mathematical Science	**-**	***Aggregate 13***
Physical Science	**-**	***Aggregate 13***
Engineering Sciences	**-**	***Aggregate 11***
Nursing	**-**	***Aggregate 10***
BA:		
General Arts	**-**	***Aggregate 15***
Science /Business/Vocational backgrounds	**-**	***Aggregate 9***

(For details see: **Http://www.ug.edu.gh/announcementdetail.php?recordID=40)**

4.1.2 Other admissions

Two categories of students constitute what is termed 'Other admissions' for purposes of the present discussion. These are the matured students' category, and the concessionary admissions.

Section 40 of the University of Ghana handbook sets out conditions for admitting matured students: Candidates aged at least 30 years who undergo a qualifying examination in English (essay comprehension, grammar and usage) and general paper (quantitative methods, critical and logical thinking and current affairs) may be considered for admission to the Bachelor of Science in administration and Bachelor of Arts programmes even if they fail to meet the admissions requirement set out under regular admissions above.

4.1.3 ***Concessionary Admissions***

This admission track is not provided for by the university handbook but flows from some of the other policy decisions of the academic board of the university (see appendix 2). It is an admission regime that serves as a reward system for persons in the service of the University; teaching and non-teaching staff. It allows for children and near relations of staff and faculty of the University of Ghana and sister Public Universities in Ghana, who do not meet the respective cut-off points under the regular admissions regime, but meet the minimum requirement of aggregate 24, to be admitted to various programmes in the university. For highly competitive programmes an applicant under a concessionary regime must fall just two points below the cut-off point.

4.2 CONTEMPORARY APPROACHES TO EQUITY

Very old equity-like policies have existed in the University, which according to Ofosu (2006) have sparked very little or no controversy for as long as they has existed. Notable among them is the Disabled policy, which allows for applicants who demonstrate a manifest disability on their application to be granted admission to various programmes on a less competitive basis. What in the view of this researcher appear capable of generating much controversy are more recent policies, namely: The Gender policy, and the Less Endowed Schools policy. The presentation below exposes the nature and scope of these policies.

4.2.1 Gender policy

The preliminary report of the inter-faculty committee to advise on policies and plans for the development of the University (1990-see appendix 2), constitutes a key component concerning the preparatory materials used in the formulation of the gender affirmative action policy.

It recommended, among other things, a gender sensitive admissions policy that will take into account the under-representation of women in higher education (see appendix 2).

This report was approved by the academic board (The highest decision making body of the University) and has been a core component of the University's admissions policy. The rationale of the policy as can be gathered from reading extracts from the report is as follows:

"*Recognizing that girls are at a disadvantage socially and bearing in mind Dr. Aggrey's famous dictum that "if you educate a man you educate an individual but if you educate a woman you educate a nation", there is a need to have more educated women to serve as role models in the society*".

Reading the document as a whole, it appears that the academic board sought to establish a relationship between general social discrimination against women and their under-representation in higher education. In this vein the committee made reference to the following social disadvantages of women:

A) Cultural bias against formal training of girls particularly at high levels of education.
B) Early marriages and attendant maternal roles which disrupt education.

On the surface of the document, the committee expresses the belief that institutional policy can be used as a tool of social change. To them, creating equity-like policies for women in higher education will offer a strong base from which to fight negative perceptions about women. Furthermore, widening access to women in itself has a developmental value (will lead to the education of the whole nation).

Also glaring in the preparatory materials that informed the gender policy is the so-called balance/diversity rationale(s). These two rationales are presented together because in most cases balancing has been used as a tool for achieving diversity (see for example discussions of the most recent affirmative action case decided by the American Supreme Court reported on Friday June 29th , 2007 edition of the **Washington Post**).

Most notable among these materials is the university rationalizations committee report which recommended a 50: 50 male-female ratio by the year 2000 (see appendix 2). The

male-female ratio as at 1989 as indicated by the university rationalization report was 80:20 in favour of males.

The above named rationale has recently been re-echoed by the Vice-Chancellor of the University of Ghana in the following words: "In the 2006/2007 academic year 5,600 students registered. Out of this number, 42% of registered students were females, it means we are drawing closer to 50:50 female to male ratio…….For now we continue to use affirmative action to boost admission to undergraduate programmes" (see: http://www.ug.edu.gh/content.php?recordID=176)

The gradual march towards this rationale can be best appreciated from a critical examination of the male-female representation in the 1980's and early 90's in comparism to that of 2006/2007, as has been shown in tables 1 and 2.

Table 1: University Of Ghana Enrolment by Gender (1980-81-1990/91)

Year Gender	1980-81 students enrolment	Gender Breakdown %	1985-86 student enrolment	Gender breakdown %	1989-90 student enrolment	Gender breakdown %	1990-91 student enrolment	Gender Break down %
Male	**3,098**	**84**	**2,807**	**81**	**3,269**	**81**	**3076**	**76**
Female	**607**	**16**	**645**	**19**	**771**	**19**	**976**	**24**
Total	**3,705**	**100**	**3452**	**100**	**4,040**	**100**	**4052**	**100**

Source: Library of Congress /Federal Research Division/Country Studies/Area Handbook series p.4 (see: http://lcweb2.loc.gov/frd/cs/ghana/gh_appen.html)

Table 1, indicates the trend of representation of women in higher education in the years 1980-81 to 1990-91. The trend shows a relatively low representation of women in higher education in the years under discussion. For example, in all the years under discussion the

representation of males in higher education was three times more than that of females (84:16 in 80/81, 81:19 in 85/86, 81:19 in 89/90, and 76:24 in 90/91). It is also interesting to note that within ten years, the trend of admission did not improve significantly with women constituting less than 25% of the total number of students admitted by 1990/91. It was for this reason that the urgent need for remedial measures became necessary.

Contrastingly, the introduction of gender based affirmative action policy, have come with a remarkable increase in the overall representation of females in higher education. The table below shows the trends of representation in all programmes as at the 2006/2007 academic year.

Table 2: Under-Graduate Enrolment for all Programmes – 2006/2007

Faculty/School	**Male**	**%**	**Female**	**%**	**Total**
Arts/Social Studies	8731	56.0	6839	43.92	15570
Agriculture & Consumer Science	588	66.7	293	33.2	881
Health Sciences	40	18.26	179	81.7	219
Engineering	113	86.25	18	13.7	131
Law (LLB)	142	59.41	97	40.58	239
Business	814	59.85	546	40.14	1360
Science	1826	65.28	971	34.7	2797
Total	**12254**	**57.8**	**8943**	**42.2**	**21197**

Source: Basic Statistics University of Ghana 2006/2007(Legon: Innolink Ltd)

In the table above, it can be observed that the overall male-female ratio in the University of Ghana is closing up with barely 16 % difference. What must, however, be of interest is that the gap seems to be closing up more effectively in the Social Sciences and Arts than

in fields like engineering. For example whilst 86.25% of total number of students admitted for engineering are males, only 13.7 % are females, a difference of more than 60%. On the other hand whilst 56% of total numbers of students admitted for the arts/social sciences were males, approximately 44% were females a difference of only 12%. This trend perhaps suggests that even if the improvement in female representation is attributed to affirmative action policies, it has not affected the system as a whole. Interestingly, there appears to be another interesting trend in the table above that shows extreme variation in male and female representation. In the health sciences, whilst only 18.26% of the represented are males as many as approximately 82 % of the represented are females. This trend seems to show a differing interest pattern of males and females in their choice of courses.

Another interesting variant of these trends that must be noted is that the overall proportion of female applicants admitted in the 2006 /2007 academic year by the University of Ghana is very close to the overall proportion of male applicants admitted (see Table 3).

Table 3: Fresher's Application, Admissions Statistics, 2006/2007

Area of Study	Students Applied	Students Admitted	Males Applied	Males Admitted	Females Applied	Females Admitted
Humanities	13794	7575	8338	4458	5456	3117
Science	2936	1823	1658	1095	1278	728
Agriculture	734	410	492	282	242	128
Engineering	426	162	365	138	61	24
Special Admissions	325	1114	85	875	240	239
Total	18215	11084	10938	6848	7277	4236

Note**:** Special admissions refer to Exchange students and Occasional studentships.

Source: Basic Statistics University of Ghana 2006/2007(Legon: Innolink Ltd)

It can be gathered from the table above that out of 7277 female applicants to the University of Ghana in the 2006/2007 academic year, as many as 4236 were admitted. This represents 58.21% of the proportion of female applicants admitted. On the other hand, 6848 male students were admitted against 10936 numbers of applicants. This represents 62% of male applicants admitted. Comparing the two figures, there is only a five percent difference of male and females admitted to the University of Ghana in relation to the proportion of male and female applicants. What is more, females tend to be proportionally overrepresented compared to their male counterparts in admissions to the most dominant programme, i.e. the programme that admits the most students at the University of Ghana: the humanities (Arts and Social sciences). Whilst 4458 males were admitted for the humanities against an applicant pool of 8338 representing 53.5%, as many as 3117 females against an applicant pool of 5456 were admitted for the humanities. This represents 57.1% of the proportion of female applicants admitted. Thus, table 3 presses further the point that the degree of gender representation in the University of Ghana is highly relative to programmes.

4.2.2 Method of Implementation

The implementation strategy employed by the University of Ghana to widen access to female applicants is very typical of the critical mass approach discussed above. In that, no specific quota is set for male and female enrollment. Conversely, admission standards are manipulated to favor women. Appendix 2 is illustrative; the cut-off point for admission of female applicants was proposed to be set two points below that of their Male Counterparts. Ofosu (2006) provides a graphical account of the cut-off levels for both genders (with the female cut-off point falling under the so called affirmative action programme) in the 2004/2005 academic year as follows:

Table 4: University of Ghana: Cut off points by Gender (2004/2005)

Programme	Gender	Cut-off point
Bachelor of Arts	Male	15
"	Female	16
Mathematical Sciences	Male	12
"	Female	13
Biological Sciences	Male	11
"	Female	13

The scheme above illustrates a one point/two point increase in the cut-off point in favour of female applicants. This shows that in practice the two points increase in favour of women as expressed in the policy document(see: appendix 2) has not been applied across board. Ofosu further observes that close to 400 female applicants benefited from this concession. He also observes that, close to 2000 applicants who met the minimum entry requirements could not be admitted for lack of space.

4.3 LESS ENDOWED SCHOOLS POLICY

Institutional differentiation at the senior secondary school level is a system level initiative that seeks to address the resource imbalance at the pre-tertiary level and address them holistically. To this end, the Ghana education service has identified 295 senior secondary

schools as less endowed schools. In its view, these schools require critical policy interventions.
(see: http://www.knust.edu.gh/administration/vc_speeches). The criteria used for the selection includes, but is not limited to: 1) Strength of teaching staff in the school. 2) Teaching and learning resources available. 3) Location of the School. 4) Socio economic background of pupils, among others. (Ofosu, 2006)

It is estimated that as at 1990 there were only 264 senior secondary schools in Ghana, By 1993, 170 more schools had been added, first by absorbing and upgrading 140 existing community schools and then by creating new ones.(Ibid). By the year 2000, close to 500 senior secondary schools could be identified in Ghana offering various programmes. Of all these institutions, Ofosu cautiously observes that only about 50 are actually well endowed, and in relative terms (measured against international standards), less than 20 are well endowed.

It appears on the plain face of policy documents that the social justice argument is the strongest point for the less endowed schools policy. The previous Vice-Chancellor of the University of Ghana captured this fact in the following words ""*The plain truth is that there are many applicants, who by virtue of the schools they attended would never experience university education if affirmative action is not applied to assist them. This is the motivation for our policy on admission for less endowed schools*" (see: http://www.ghanaweb.com/GhanaHomePage/education/artikel.php?ID=67019).

The policy commenced in 2004 after passing the approval of the academic board (appendix 2) and has since seen three batches of enrollments.

National policy considerations also appear to have underpinned the social justice drive of the University. In the Ghana poverty reduction strategy document a policy framework has been provided for mainstreaming the vulnerable and excluded in human resource development (GPRS 2, 2006-2009, p.54). To this end, institutions are mandated to strengthen the processes of empowering the vulnerable and excluded, to reduce their risk,

protect their rights, and enhance their contribution to national development. The document sees such policies as critical to economic growth and sustainable social development.

4.3.1 Procedure for Implementation

Gathered from the face of the document, the less endowed school policy is executed through a quota regime and financial incentives. The academic board sought to reserve 300 spaces every year for students from less endowed schools (University of Ghana special reporter vol 43. No.9). It is worth noting that in practice the policy has resembled more of a critical mass approach than a quota scheme policy. Table 5 illustrates the pattern of enrollment of students under the less endowed schools policy.

Table 5: Enrollments of Students from Less Endowed Schools

Academic year	**Number of students from less endowed schools admitted**	**Total number of students enrolled**	**Percentage of students from less endowed schools enrolled**
2004/2005	230	8044	2.859
2005/2006	280	6963	4.021
2006/2007	153	5600	2.73

Source: **University of Ghana special reporter: Vol 43&44**

From table 5 we see a fluctuating enrollment pattern of students from less endowed schools. The quota of 300 spaces for such students has not been realized in any of the three admission years above. In the most recent admission year (2006/2007) just a little over half (153) of the quota was actually allocated to students from less endowed schools. No reasons have so far been issued publicly by the admissions board to explain this trend.

The year 2005/2006 represented the highest number of less endowed school students admitted so far: only 20 spaces short of the quota (280). It represented a gradual progression towards the 300 quota spaces as the previous year was 230. All in all, it appears that the quota scheme policy mirrors a gap between policy intentions and policy outcomes.

Another essential feature of the less endowed schools policy is its scholarship component. Beneficiaries from this policy are assigned to a scholarship package that caters for their academic facility user fees. This implies that minus living expenses, the higher education of a student under this policy is virtually free. Novel as this scholarship regime may be, it still bears more of the characteristics of a needs based scholarship. Consequently, it establishes a link between the type of school attended and the extent or degree of need.

4.4 CHAPTER SUMMARY:

This part of the work provided a detailed presentation of how the two equity policies under consideration have been implemented so far, and the justifications for their adoption. In all, five tables were presented. Table 1 showed the representation of women by gender from 1980/81 academic to 1990/91 academic year. It was observed that within these ten years period, there was no significant increase in female enrollment. In table two, we see a significant improvement in the overall representation of women. We also saw patterns of overrepresentation and under representation of both genders, in various programmes: men were overrepresented in engineering, whilst women were over represented in the health sciences. There also appeared to be a closing gap between genders in their representation in the Arts and Social Sciences (Humanities).

Table three presented data on the number of student applicants by gender in the 2006 academic year and examines the proportion of male and female applicants who were actually admitted. It emerged that the proportion of female applicants admitted for the humanities was larger than that of male applicants. In table four, the cut- off points for various programmes by gender was presented. The objective was to provide a picture of how the policy has worked in practice. Finally, table five gave the trend in admission of less endowed students. It was discovered that none of the three years of implementation, exhausted the quota for less endowed students.

CHAPTER FIVE

5. ANALYSIS AND DISCUSSIONS

In this chapter, the emphasis will be on evaluating the various rationales and procedures that apply to affirmative action policies in the University of Ghana within the framework of the filter model. To this end, the objects and procedures of these policies will be measured against the requirements set by Law to ascertain its validity or otherwise. The chapter commences with an analysis of the gender policy justifications of the University of Ghana.

REMEDYING SOCIAL DISCRIMINATION: GROUP RIGHTS ARGUMENTS VERSUS INDIVIDUAL RIGHTS ARGUMENTS.

Remedying social discrimination presents itself as a strong point in the gender policy justifications of the University of Ghana. Looked at more carefully, the justification provokes a serious legal trouble in legal jurisprudence. This has come to be known as the group rights versus the individual right debate (Lloyds, 1972). Put more contextually, it provokes the question: Should the rights of a class or group of people, in this case women, be held supreme over that of an individual who does not belong to the group?

Group rights thinkers will respond in the affirmative. In their view, group interests supersede individual interests. Gender policy benefits women in general by providing more women the opportunity for education. Thinking in this line, non-discrimination clauses are interpreted to mean non-discrimination against a particular group such as women. To legitimize this thinking in the Ghanaian context, it is important to ask the question: Does the Ghanaian Constitution lends itself to the group rights approach to interpretation? This question is best answered in the light of article 17 (2) and 17 (3) of the 1992 Constitution of Ghana which features non-discrimination clauses.

Article 17 (2) clearly adopts an individual rights approach. On its plain face it states *"No person shall be discriminated against on the basis of gender, race, color……..."* The

reference to person in this clause indicates an individual rights approach to constitutional construction.

Making this view more convincing is the fact that article 17(2), falls under chapter 5 of the Constitution, which is a chapter on the fundamental human rights of the citizen. In the opening clauses of chapter 5, at article 12(2), it is stated "fundamental human rights of the individual contained in this chapter". Once again there is a reference to the individual and not a group of individuals. Using a plain meaning perspective of interpretation it is clear that non-discrimination clauses herein are referable to the individual.

It is also possible to come to the same conclusion if a more holistic approach is adopted towards interpretation. If 17 (2) is read together with 17(3) the context in which discrimination is used becomes even clearer. Article 17 (3) defines discrimination to mean giving different treatment to different persons by virtue of their gender, race, etc. Impliedly, any reference to group identity, to justify any form of preferential treatment, cannot be justified according to the Constitution. By applying group rights thinking to policy making and thereby providing preferential treatment to women, a key ingredient of the principle of legality has been breached – the principle of non discrimination. What is to be expected of the Law therefore, is a rejection of this policy rationale and a consequent stabilization of the system.

THE QUESTION OF FAIRNESS

Fairness is a critical element of the principle of legality and provides a useful context for understanding the legal validity of any policy. Applying a holistic approach to constitutional interpretation, clear problems relating to fairness emerge from the gender policy. Article 23 of the 1992 Constitution of Ghana requires all administrative bodies to be fair and candid in the exercise of their discretion. Following it up with article 296 (b), it can be observed that fairness imposes a duty not to be "arbitrary, bias or capricious".

It is humbly submitted that the University of Ghana's gender policy sins against all these three indicators of fairness in the following ways. First, the biasness of the policy is reflected in the fact that it applies to the system selectively and not holistically. For example, table 2 above shows that as many as about 82% of students admitted in the health sciences are females and only about 18% are males. This huge under-representation of males in the health sciences has received no remedy. However, women under-representation in other fields has provided a basis for implementing affirmative action policy throughout the entire system. This selective application constitutes biasness and renders the policy unfair.

How arbitrary is the policy? In this vein, it is worth noting that the policy in itself lacks clarity, and focus. The gender affirmative action policy is not captured in the student's handbook, which clearly states all the modes of admission to the university. Neither is it referred to in the statutes of the University. Meanwhile no clear guidelines have been issued by the University council as to the mode of implementing this policy and the considerations. The basis of this policy can be found only in preparatory materials, such as Academic board minutes approving the policy (see appendix 2). These minutes do not specify clearly the modalities for implementation. Moreover, there is no factual basis for a blanket application of the policy across the system. It can be inferred from table 3 that the proportion of females admitted to courses in the humanities in proportion to the number of female applicants is greater than the number of males admitted in relation to male applicants. This information is useful because humanities provide the largest amount of admission spaces every year in the University of Ghana. Against this background, it can be seen that the sustained application of affirmative action policies across the system is not justified.

Another twist to its arbitrary nature is the fact that it does not conform to any system of logic. Assuming it is a reality that women were being discriminated against as a result of certain socio-cultural practices and hence suffer some educational disadvantages, should that be a basis to make a male university applicant pay for obnoxious cultural practices which he may be innocent of? Of course not. Legal rationality and precedent lean

towards individual civil and criminal responsibility. Even where liabilities arise as a result of group action, the liability of each of the members of the group must be independently established. It therefore amounts to arbitrariness to impose the failures of society on individuals. It is even more arbitrary to intend to solve the problem of exclusion or discrimination through discrimination. The act of discriminating against males in order to include more women does not uproot the problem of discrimination altogether from society, it only exchanges one kind of discrimination for another.

The capricious nature of the policy can also not be disputed; it is given to lots of inconsistency in its implementation. For example, even though the Academic board decision referred to a two point increase in favor of women, it has not been implemented homogenously across programmes. For example, in table 4, cut off points for females oscillated between a one point and two point differences from that of males (Ofosu, 2006). Clearly, a pattern of inconsistency can be discerned.

Is it possible for the University to circumvent the consitutional challenge of fairness by raising issues of its rights to autonomy as spelt out in the University of Ghana Act (1961)? Is it possible for the University to escape these challenges by raising issues of its powers to make statutes for the running of the University under section 15 of the Act? The answer to both questions is a big No. Any statutes flowing from the University Act is subject to the review powers of the Courts and as per article one of the Constitutions can be declared void by the Supreme Court of Ghana to the extent of its inconsistency. Thus, no policy or legal argument can avail the University if such argument clearly falls short of the fairness requirements imposed by the constitution.

To conclude this section, it is worth saying that within the framework of the principles of legality, it may be difficult to reconcile the object of remedying social discrimination and the demands imposed by Law. It is in this regard that the filter may be more inclined to restore the system to the status quo ante.

BALANCE/DIVERSITY RATIONALE

Also worth analyzing is the Balance/diversity rationale within the framework set by the filter model. It will be right to start by admitting that legal precedents appear to wholly support these interrelated rationale(s) in principle. In the Bakke case, Justice Powell stated clearly that the diversity rationale justifies the use of affirmative action policies. This position was followed in the two University of Michigan cases. Nevertheless, the courts have been quick to apply a so-called narrow tailoring analysis to these rationale(s). In the case of Gratz and Bollinger (one of the two Michigan cases), the emphasis was on ensuring that a not "too large a benefit" has been given to the so-called beneficiaries and that no disproportion results to the disadvantage of non-beneficiaries. "Disproportion" appears to have been defined in the decision in relation to the weight of points given to an individual for belonging to a disadvantaged group. It was the observation of the court that a 20 points allocation to minorities out of 150 is too large, rendering the policy not sufficiently narrowly tailored.

Drawing analogies to the Ghanaian scenario serious problems can be foreseen. A two point increase in favour of women as evidenced in the policy document in my view offers a very disproportionate benefit. Bearing in mind the observation of Ofosu (2006) who states that at least 400 women benefited from the affirmative action policy in 2004/2005 academic year, it is possible to construe a "too large a benefit" for women. 400 places constitute a little over 10% of the number of male students who were rejected in 2006 (rejected male applicants added up to 3,880). In my view such a concession for women is relatively too large assuming a similar amount of advantage was granted to women in 2006.

Another dimension of the narrow tailoring analysis which fixes the gender policy is its insistence on similar admission procedures for all applicants. In the Hopwood v Texas case, the court invalidated the Law school's admission programme because it provided separate tracks and procedures for so-called disadvantaged and non-disadvantaged

applicants. This must be distinguished from Justice Powell's plus factor as defined in the Bakke case. The plus factor requires that an applicant is given a plus for being a minority, and then subsequently his entire qualifications are compared against the entire pool of applicants.

On the other hand, separate admission procedures make a person's race or gender the determinative factor in admissions programme or the sole basis for making a person eligible for a certain kind of treatment. More precisely, the case for setting separate admission criteria was completely rejected by the courts in Johnson v. University of Georgia. It is in this context that the Ghanaian Balance rationale may have problems. By setting different admission cut-off points for each gender, it appears patently that the University seeks to make gender too important a consideration in defining the admission procedures. Bearing in mind the narrow tailoring analysis as an important filter ingredient, one may rightly surmise that the legal validity of this rationale may be under question.

More importantly, the Georgia decision suggests that the diversity rationale can only justify gender/race based affirmative action policies if there are no other means of achieving diversity. In other words, it must be proven that race or gender neutral methods for achieving diversity do not exist or are not in sight. Simply put, the court requires proponents of such a policy to answer the question: Are there no better ways of achieving the same results apart from giving preferential treatment to one group? In the context of the University of Ghana, it is my humble submission that using gender policies to enhance women representation ignores other useful solutions to the same problem, if not misses the problem entirely. The real problem appears to be limited access and not equity. Drawing from Ofosu (2006), who observes that at least every year close to 2000 qualified applicants (who meet the minimum entry requirement) are rejected, it can be estimated using the male-female admission ratio of 58:42, that at least 840 qualified females who meet the minimum entry requirement are rejected every year; this number is greater than the number of females admitted through the affirmative action policy.

Resultantly, a paradox is born: the University claims to be implementing a policy to boost the representation of women while at the same time its admission regime rejects qualified women. It is in this regard that it sounds more reasonable to expand access rather than to pursue a hollow policy of equity.

It is possible to raise the excuse of resource inadequacy in an effort to pass the narrow tailoring test, but this excuse will not avail the University because if that is the case then the policy focus has been misplaced. The University may be queried for not focusing its energies on resource mobilization rather than on equity policies.

THE LESS ENDOWED SCHOOLS POLICY

The social justice rationale appears to legitimize the less endowed schools policy on its face. Indeed, the directive principles of state policy in the Ghanaian Constitution as well as the preamble to the Constitution cited earlier in the work, seek to create a social order founded on social justice. That fact notwithstanding, social justice as a concept is vague and lacks definitional accuracy. It is for this reason that its use as a rationale is circumscribed by parameters set by Law.

In the Ghanaian context, students from less endowed schools are referred to as deprived of the minimum educational benefits that can enable them to make competitive grades for admission into higher education institutions. Be that as it may, it is suggested that allocating to them 300 spaces as discernible from the academic board decision (see appendix 2) is very much required to create an equal playing field for all.

Good as this intentions may be, it is submitted that this policy constitutes a quota policy; a technique which has been considered by the courts as an invalid means of implementing an affirmative action policy. In the Bakke case, sixteen places were reserved for students who had indicated that they were “educationally/economically disadvantaged”. The American Supreme Court observed that there is no basis for implementing a rigid quota policy because it isolates other important considerations in the admissions process.

Professor Archibald Cox, who argued out the Bakke case in favor of the University of California-Davis, derived three conclusions from the court's decisions.

(1) Quotas may not be used to reserve a fixed number of spots for minority students.

(2) Simply converting a particular programme from quota into goals will not protect a particular programme from challenge.

(3) Separate admissions committees may not be used, students must be evaluated by the same committee (Bakke Case).

Cox, analysis points out that no matter which way a quota policy is formulated or implemented, it can't escape the strict scrutiny of the courts.
Decisions following the Bakke case, such as the two Michigan cases, have clearly disapproved of the quota policy and have validated a policy sometimes based on the extent to which it can distinguish itself from a quota policy. In the Grutter v. Bollinger case, for example, the sixth circuit attempted to distinguish between a quota policy and a policy that enrolls a critical mass. In the view of the court, the former is clearly invalid but the latter can pass the validity test.

In the light of the above, it is clear that there is no basis in precedent to justify a quota based affirmative action policy. Therefore when the University of Ghana introduces a quota based policy as a means to an end, it is clearly failing to apply itself to legal standards set by the narrow tailoring analysis.

The less endowed schools policy must also conform to the instrumental test. If it claims to promote the interest of the economically and socially disadvantaged then the appropriate question to ask is:
Who is socially and economically disadvantaged? Does attending a less endowed school necessarily make a person disadvantaged and therefore more limited in terms of life

chances? Logically thinking, it is possible to find the economically disadvantaged in well endowed schools because of excellent academic performance.

It is also possible to find people from rich families in such less endowed schools whose parents can afford extra tuition and additional educational facilities to support their studies. It is for this reason that the policy in my view seems to be inadequate in addressing the general problem of the socio-economically disadvantaged student.

Why doesn't it target disadvantaged students in general both from well- and less-endowed schools? The case of Indira Sawhney v. Union of India, illustrates how such skewed approaches to disadvantaged groups can present legal difficulties. In that case, the Supreme Court of India was quick to observe that scholarship packages targeted at disadvantaged groups do not necessarily apply to every individual belonging to that group. It established a two tier test.

First the applicant must belong to the group and second the applicant must satisfy the purposes for which the scholarship was instituted. In this vein, it is worth asking: do all students proceeding from a less endowed school need a scholarship? (Since the scholarship is need based).

It is evident that some of these students are wards of rich cocoa farmers and attended these schools for reasons of geographical proximity (Ofosu, 2006). Thus making meaning of this policy in the context of the Indira Sawhney test, one may have cause to question the social justice rationale; there may be recipients of this advantage who are not necessarily disadvantaged.

Another interesting dimension to the problem is its application to only less endowed secondary schools. Knowing that educational disadvantages accumulate and linger on, it may be problematic to apply the policy only to students who attended a less endowed senior secondary school. What about those who attended less endowed junior secondary

schools? Isn't it reasonably deducible that the educational disadvantages suffered in lower secondary may have affected their performance at the senior secondary level?

Lack of answers to these questions, makes the less endowed schools policy highly problematic. Clearly, the policy fails to bring itself within the requirement of the instrumental test which requires a reasonable proof of the problem solving value of a policy.

INTER POLICY COHESION

At this stage I seek to answer the question: How do equity-like policies in the University of Ghana jell when considered as a composite unit? Answer to this question is important for two reasons.

First, these two policies discussed above can fail the instrumental test on grounds that the rationale of other co-existing equity-like policies at the University of Ghana contradicts their rationale. Or taking both policies together they fail to communicate the rationale they stand for individually.

To begin this analysis, it appears that the policy does not contemplate the fact that both policies can inure to the benefit of an individual concurrently. Being a woman from a less endowed school, such an individual has two benefits. First she can be considered as a less endowed student, and second she can be considered as a woman. Viewed in this way the two policies may overlap to offer unreasonably large benefits to a particular individual sinning against the narrow tailoring analysis which requires limited preferential treatment as much as possible.

The concessionary admissions policy of the University of Ghana presents another serious threat to its equity-like policies, if the admission policy of the University is reviewed by the courts as a whole. Under the concessionary admissions, wards of lecturers and staff of the University of Ghana are allowed to present their wards for admission once they have met the minimum entry requirements.

In other words, the cut-off point for various programmes is relaxed for wards of professors and other staff of the University. Well intended as this policy may be, it casts a slur on the equity rationales championed by the University, such as the social justice argument. Wards of University professors are relatively well endowed in terms of their socio-economic positions, – to whom much is given much must be expected if social justice will not remain a mere rhetoric. By granting their wards access under more flexible conditions, admission policy appears to rather skew in favour of the strong rather than the vulnerable.

Thus, a clear contradiction emerges: Does the social justice rationale justifying the less endowed school policy jell or fit well within the mechanics of the University of Ghana admission policy? If not, as can be inferred from the above, then the social justice purpose cannot be served by such a policy. The instrumental test may therefore not play to the advantage of the less endowed schools policy.

It is also crucial to ask the question whether these policies from a more social and psychological perspective cohere, or help to achieve the larger social policy objectives of equality, female empowerment and the like. Does it empower women or does it dis-empower them? Does it empower the disadvantaged, such as people from less endowed schools, or does it only confirm and sustain feelings of inferiority?

In this regard, Justice Powell, in the famous Bakke case, did observe "preferential programmes may only reinforce common stereotypes holding that certain groups are unable to achieve success without protection based on a factor having no relationship to individual worth". Powell's observation points to the personal inadequacies those individual beneficiaries may face, thinking that, for such policies they couldn't have achieved their individual successes.

At the societal level, doubts may be created in the minds of those who would be the individual's clients, patients, customers, etc., as to the individual's true abilities and

capabilities. In sum, such policies may create a huge obstacle for members of the disadvantaged group in their quest and attempt to achieve genuine equality.

CHAPTER SIX

6 CONCLUSIONS

6.1 WHAT CAN WE EXPECT FROM THE COURTS?

In the preceding discussions, an attempt has been made to explore the central features of the gender affirmative action policy and the less endowed schools policy. Within the "Law as a filter" analytical framework, the study has progressed by examining the central legal constraints, namely the principles of legality constructed from the Constitution, and the narrow tailoring test as well as the instrumental test largely set by case Law.

Against this background, the study has measured these two policies to ascertain the extent to which they can "filter through" the test of Law and cause their intended changes or otherwise. Four findings were obvious from the study.

First it was noticed that the gender policy of the University fails to apply itself to non-discrimination – a critical value of the principle of legality. In that, by using group centric perspectives to justify affirmative action policies that discriminate against individuals, the policy fails to bring itself within the constitutional perspective of rights. The Constitution adopts a strictly individual centered approach to rights protection.

It also fails to satisfy the standards of fairness – another critical element of the principle of legality. Fairness as set out in the Ghanaian Constitution imposes a duty not to be biased, capricious or arbitrary in exercising administrative discretions. Conversely, the University of Ghana gender policy applies the policy selectively to the system, paying no attention to the fact that males are under-represented in certain sections of the system. It

also fails to set clear rules and guidelines for the implementation of the policy and pays limited attention to the factual deficits of the policy.

It also flowed from the study that the diversity/passive representation rationale does not adequately fit into the caveats set by the courts even though justified in principle. For example, it was deciphered based on factual evidence from tables 2 and 3 that the policy runs the danger of granting disproportionate benefits to women. More grave was the fact that the policy selects women under a different criterion. This was viewed to lack legal validity under the authority of the decision in the University of Georgia case.

More importantly, it came out that the real problem may have been misidentified. Using factual information presented in chapter three, it became obvious that expanding access for women should be the critical policy issue and not the implementation of equity policies. It was, for example, established that the number of women who meet the minimum entry requirement every year and are turned down is larger than the number of women who benefit from affirmative action policies.

Taken all the arguments supporting the gender policy together and fitting it within the filter model, it appeared that the principles of legality exemplified by principles such as fairness and non discrimination, the narrow tailoring analysis as exemplified by the case law and the instrumental test negate the validity of this policy. Within the framework of the filter model therefore, it is to be expected that the gender policy will be filtered out if a legal test is put up. Its capability for social change is therefore under question. The court is expected to lean towards social stability rather than social change.

Also discussed was the legal basis of the less endowed schools policy. The policy, it was observed, is strongly justified by its proponents in the context of social justice objectives. It was noticed that the purposes of the policy may fail because it may end up benefiting students who are not actually socio-economically disadvantaged and sidelining those who are in fact disadvantaged. In this vein it was established that belonging to a disadvantaged social category does not necessarily make one disadvantaged.

More importantly it was noted that the so-called less endowed schools policy is implemented through a quota regime. Such a regime offends the narrow tailoring analysis espoused in decisions such as Bakke. The clear stipulation of 300 spaces for less endowed students, it was noted, does not fit any acceptable legal precedent.

The problem of who is less endowed was also brought to bear as the key definitional difficulty of this policy. It was concluded that by making "less endowed" applicable only to students from less endowed senior secondary schools, the policy gives a blind eye to lingering educational difficulties which may affect future performance. Thus, it fails to remedy the disadvantages of a less endowed student in the real sense.

Put together, it can be observed that the critical requirements of the instrumental test and the narrow tailoring analysis are not satisfied by the less endowed schools policy. In the sense that it fails to adequately address the problems it purports to solve and adopt procedures that give "too large an advantage" to the so-called disadvantaged group. The expected behavior of the courts within the framework of the filter model will be to block this policy and ensure a return to the status quo ante.

The study went further to examine the various components of the University of Ghana admissions policy and how it makes sense as a composite unit. In this sense, strong contradictions were identified. It was, for example, seen that the concessionary admissions policy in itself mirrors social injustice and cannot be reconciled with the social justice rationale of the less endowed school policy.

It was also realized that a double benefit may accrue to an individual based on gender and school attended which may give rise to a disproportionate benefit. Finally, it was observed that the deeper social policy objective of ensuring equality may not be achieved after all, because of very deep psychological and social problems that may arise from implementing policies of this kind.

Fitting these composite issues into the filter model it became obvious that the social justice rationale and the social policy objective of equality may fail the instrumental test because they clearly fail to remedy the problem they claim to remedy. In this context we expect the court to prefer social stability over social change.

6.2 WHERE DO WE GO FROM HERE?

Having clearly exposed the legal difficulties that flow from the two policies initiated by the University of Ghana, the question that immediately follows is "What alternatives can be put in place to achieve the same goals?" What follows are suggestions that if implemented can work to achieve the rationales advanced by these policies.

One way of tackling the legal difficulties, is for Institutions to lobby for the Incorporation of Clauses that mandates affirmative action in the Constitution. Such is the case in Jurisdictions like Uganda. The constitutional provision must include a claw back clause that will exclude the application of non-discrimination /equal protection clauses to affirmative action policies. By so doing, constitutional questions such as the degree of fairness and reasonableness of such policies will not arise, because fairness will be interpreted to include affirmative action. Institutions must however be mindful of the inherent rigidity in legislations as discussed earlier in this work when adopting this approach.

In relation to the less endowed schools policy, dispensing benefits on the basis of socio-economic disadvantage, rather than the category of school an applicant attended, will provide a more credible basis for meeting the social justice rationale. Socio-economic disadvantage must be measured based on a clear criteria that is largely based on the extent and level of need and not mere institutional affiliation. Since most poor people are likely to end up in less deprived schools because of less competitive scores, a disadvantaged tailored policy, will necessarily have a beneficial impact on students from less endowed schools. At the same time it allows disadvantaged people who find themselves in well endowed schools to be catered for. This also eliminates the latent problems in defining what constitutes a less endowed school and who qualifies as a

student from a less endowed school. In the nutshell it provides a more logically coherent basis for justifying the less endowed schools policy.

Also, knowing that majority of students from less endowed schools are exposed to some educational disadvantages, it will be useful that these students are exposed to developmental and enrichment programmes in the early years of their education. These programmes are often available to most students in well endowed locations. The benefits of such programmes will be reaped at the lower levels so that at higher levels these students can compete on the basis of merit and not on preferential treatment. This will go a long way to eliminate the feelings of inferiority that sometimes attaches to beneficiaries of affirmative action.

In relation to the gender based policy, it is suggested that attention should be paid to individual characteristics in the selection process rather than to group characteristics. Additional weight can be given to other qualifications, such as exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, etc. These indicators can equally provide a basis for giving a plus to a student rather than gender which is more controversial.

Another dimension of the solution is basing admissions on a selective test that is gender neutral. Standardized tests have been criticized for statistically preferring men over women, and for having a built in cultural bias (see: Elson, 1989 standardized test-helpful or harmful PTA Today, March 1989 at 28, 29 &30). University of Ghana admissions make use of performance in the West African Examination Council Examinations which are largely standardized, in order to be able to easily select students. Benefits from administrative convenience should not be allowed to justify the use of standardized tests when they have been shown to prefer one gender over the other. To this end, the problem can be remedied by developing other examination models that are gender neutral. Alternatively, the existing test can be made more gender neutral in its approach. Equity-

like policies are not the answer, the answer lies in a re-examination of the mechanics of admission.

In sum, it is the opinion of the author that group tailored affirmative action programmes, no matter which form and content, are not the best way to achieve the rationales of non-discrimination and social justice. The strict scrutiny approach adopted by the courts and the heavy demands imposed by the Constitution make it very difficult to legally justify such affirmative action policies, no matter their intent and purposes. Consequently, it is suggested that more individual based approaches to equity as advanced in this section should be adopted: admission processes should be based on applying as in Justice Sandra O'Connor's words

"*A highly individualized and holistic review of applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment*." (In Grutter v Bollinger)

REFERENCES

Bennett, J. (2002). *Exploration of a "Gap": Strategising Gender Equity in African Universities*. (http://www.feministafrica.org/02-femistafrica.org/012002/jane.html). 15th July, 2007.

Burg, E. (1977) "Law and Development". *American Journal of Comparative Law*. Vol. 25, p.498-510

Chivaura, I. (2000) *"Affirmative Action at the University of Zimbabwe",* Paper presented At Conference on Gender Equity, Democracy, and Human Rights, University of Zimbabwe.

Department of Education (1997) *Education White Paper 3: A Programme for Higher Education Transformation in South Africa*. Pretoria: Department of Education.

Department of Education (2001) "The National Plan for Higher Education". *A programme for higher Education Transformation in South Africa*. Pretoria: Department of Education.

Elson, J. (1989) "Standardized test-helpful or harmful". *PTA Today*, at 28, 29 &30

Faculty of Law (2007) *Ghana Law since Independence: History Development and Prospects*. Ghana: University of Ghana

Farrar, J. (1977) *Introduction to Legal Method*. London: Sweet and Maxwell

Republic of Ghana (2005) *Ghana Poverty Reduction Strategy (2006-2009)*. Ghana: National Development Planning Commission.

Gupta, A. (2006) *Affirmative Action in Higher Education in India and United States of America: A study in Contrast*. Delhi: Bharati College University of Delhi

Institute of Education, London (2004) "Gender Equity Policies in a Globalized Market". *Working Paper 2*, London: University of London.

Laswell, H. (1950) *Politics: Who gets What, When and How?* NY: New York Publishers

Lloyd, D. (1972) *Introduction to jurisprudence* (3rd Ed,) Electronic Encyclopedia, Sixth Edition, Columbia

Mlama, P. (2001, September) *Gender Equity Programming in Higher Education*. Paper presented at the Higher Education Policy Forum, Nairobi, Kenya.

Ocran, M.T. (1978) *Law in Aid of Development Issues in Legal Theory, Institution Building and Economic Development in Africa*. Ghana Publishing Corporation.

New Economist. (2006) *Race, Religion and Economic Status in India*: London

Ofosu, M. (2006) *Access to Education and Gender Imperatives, Policies and Choices in the Ghanaian System*: Ghana, University of Ghana.

Rawls, J. (1973) *A Theory of Justice*. Oxford: Oxford University Press.

Said, A. (1982) "Stability and Change: Revisiting the Functions of Law" *Review of Legal Sociology*, 10:1, 73-92

Skilbeck, M. et al. (2000) "Access and Equity in Higher Education: An International Perspective on Issues and Strategies". *Prepared For The Higher Education Authority.* Dublin: Higher Education Authority. p.10

SY Bimpong, B. (1995) "The Law of Interpretation in Ghana" (Exposition and Critique). Accra: *Advanced Legal Publications*, p.32&33

Turner, B. (2006) *Vulnerability and Human Rights*. Penn: PSU Press.

University of Ghana (2005-2007) *Students Handbook*. Legon: University of Ghana

University of Ghana (2006) *Basic Statistics 2006*. Accra: Innolink Ltd

University of Ghana *Special reporter*, Vol 44 no.6

University of Ghana Special reporter, Vol. 43 no. 9

Washington Post (June, 29th 2007) *Divided Court Limits Use of Race by School Districts.* Washington DC.

STATUTES CONSIDERED

Constitution of the Republic of Ghana (1992)

Constitution of Uganda (1995)

Courts Act 1993, (Act 459), Republic of Ghana

Education Act, 1961 (ACT 87), as amended by The Education (Amendment) Act, 1965 (ACT 266). Republic of Ghana

Labour Act, 2003 (ACT 651). Republic of Ghana

University of Ghana Act, 1961, (Act, 79)

University of Ghana Statutes, Ghana: Legon.

LIST OF CASES

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223 at p. 234, C.A.

Biney v.Biney (1974) 1 G.L.R. 318, C.A

Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002)).

Gratz v. Bollinger, 288 F.3d 732 (6th Cir. 2002)).

Hopwood v. State of Texas, 78 F.3d 932 (5th Cir. 1996) (Hopwood II).

Hopwood v. State of Texas, 861 F. Supp. 551 (W.D. Tex. 1994) (Hopwood I).

Indira Sawhney vs. Union of India (1992) (Supp) 3 SCC 217

Johnson v. University of Georgia, 106 F. Supp. 2d 1362 (S.D. Ga. 2000).

Marbury v. Madison 5 U.S. (1 Cranch) 137 (1803).

NPP v. AG (ct: Bimpong Buta, 1995)

Podberesky v. Kirwan, 956 F.2d 52 (4th Cir. 1992),

R v. Inhabitants of Ramsgate (1827) 6 B.&C.712

Rugby water Board v. Shaw'Fox (1973) A.C 202

The Republic Versus 1) The University of Ghana 2) The Acting Vice Chancellor University of Ghana. Exparte (1) Prof. Edward Ofori Sarpong (2) Prof. Kwesi Agyeman. (Unreported)

University of Michigan v Ewing, 474 U.S. 214 (1985) 474 U.S. 214.

INTERNET RESOURCES USED

University of Ghana official website (http://www.ug.edu.gh/announcementdetail.php?recordID=40). 15th Nov. 2006

University of Ghana official website (http://www.ug.edu.gh/content.php?recordID=176). 10th March 2007

Kwame Nkrumah University of Science and Technology official website (http://www.knust.edu.gh/administration/vc_speeches). 10th March 2007

Ghana news website (http://www.ghanaweb.com/GhanaHomePage/education/artikel.php?ID=67019). 10th June 2007

Library of USA Congress website (http://lcweb2.loc.gov/frd/cs/ghana/gh_appen.html) 30th December 2007

APPENDIX 1

EXTRACTS FROM THE AKWESI AGYEMAN CASE

IN THE SUPERIOR COURT OF JUDICATURE
IN THE AUTOMATED FAST TRACK HIGH COURT, ACCRA HELD
ON TUESDAY THE 13TH DAY OF JUNE, 2006 BEFORE HIS
LORDSHIP JUSTICE PAUL BAFFOE BONNIE

SUIT NO.AP.1712006

THE REPUBLIC

VERSUS:

I.UNIVERSITY OF .GHANA
2. THE ACTING VICE CHANCELLOR
UNIVERSITY OF GHANA

EX-PARTE: (1)PROFESSOR EDWARD OFORl
SARPONG
(2) PROFESSOR... KWASI AGYEMAN

.....

LIBRARY

FACULTY OF LAW
UNIVERSITY-OFGHANA
RULING

In this application for **JUDICIAL REVIEW** the applicants are claiming against the Respondents amongst other things;

1. a. **CERTIORARI t**o quash the Decision to Remove Professor Ofori Sarpong ...as Pro Vice Chancellor of the 1st Respondent University as contained in second Respondents letter of February 6th 2006.

   b. The decision to dismiss the 2nd applicant Professor Kwesi Agyeman from the University of Ghana as contained in letter dated 6th February, 2006 from 2nd Respondent to second applicant, or in the alternative,

2. (ii) A **declaration** that the purported removal of Professor Ofori Sarpong (Pro Vice Chancellor) by the acting Vice Chancellor is ultra vires and or unlawful and or unauthorized.

(iv) A **declaration** that the purported dismissal of the second applicant by second respondent is wrong in law, unauthorized and beyond the powers or authority of the second respondent.

BACKGROUND

Following leakages and alleged malpractices at the University of Ghana in the course of the 2004 -2005 academic year examinations, a committee, which later came to be known as **"Mfodwo Committee",** was set up to investigate these allegations of leakages and

examination malpractices. After the investigation and report, a Disciplinary Board was set up for senior members of the University. The first applicant, Professor Owusu Sarpong, was at all material Times, **The Pro-Vice Chancellor of the University** while the **2nd Applicant Professor Kwasi AGYEMAN** was the Head of the **Philosophy Department.**

The Disciplinary Board invited the two applicants by separate letters to respond to allegations of **Misconduct** made against them. The applicants responded to these written allegations and also appeared before the disciplinary board where representations were made on their behalf. Then followed the completion and submission of the committee's findings to the Vice Chancellor. The report showed that the Disciplinary Board made some findings against the two applicants herein, and made some recommendations of sanctions to be imposed on them. Purporting to act on these recommendations, the Ag. Vice Chancellor wrote two letters to the first applicant and one letter to the 2nd applicant. For clarity I will like to quote excerpts of these letters.

The first letter to the 1" Applicant was dated February 6, 2006 and titled **"REPRIMAND"**. It read;

> "... FoIlowing My acceptance 0-f the recommendation of the Disciplinary Board for Senior Members, I write to reprimand you for your failure to exercise good judgment, which embarrassed the University.
>
> I hope a repetition of the lapse will not occur in future''.

On the same date the 1st Applicant has served with another letter written on the same day and that contained the following among other things;

Dear Sir,

DISCIPLINARY BOARD FOR SENIOR MEMBERS

I write in respect of the above. I have finally received the report of the Disciplinary Board for Senior Members.

The Disciplinary Board by a majority decision of 4-2 found you guilty of the charges and recommended thus:

"that a reprimand be written under section 43 (c). In addition, the Defendant be removed from the office of pro-vice chancellor"

I have considered the recommendations of the Disciplinary Board, the substance of their decision and I am satisfied that they have come to the proper conclusion and I endorse their recommendations.

Therefore by this letter, I am applying the sanctions and you are hereby removed as the pro-vice chancellor with immediate effect

The 3rd letter written on the same 6th February, this time to the 2nd applicant had wording similar to that in the 2nd letter to the 1st applicant referred to above but concluded thus:

"The Disciplinary Board by a majority decision of 5 -7, found you guilty of the charges and the recommendations of the Board are as follows:

1 That the defendant's conduct in indulging in Fraudulent award of unearned marks and grades has shown him as one who lacks the necessary integrity required of a person entrusted with the assessment of students and the handling of examination processes in a University.

2 That he be sanctioned according to Section 43(a) of the statutes of the University to outright dismissal from the University as he cannot handle the office of examiner with the requisite level of integrity".

I have considered the recommendations of the

Disciplinary Board, the substance of their decisions and
1 am satisfied that they have come to the proper
conclusion and l endorse their recommendation.
Therefore, by this letter, l am applying the sanctions and
you are hereby dismissed form the University, with
immediate effect''

This in a nutshell is the background of the case that has resulted in this application for Judicial Review by the two professors.

CASE FOR THE APPLICANTS:

1st APPLICANT -PROF OFORI SARPONG.

The case of the 1st Applicant is simple. It is true that the Mfodwo Committee was set up to do some investigations. Following that a disciplinary board was set up to which he was invited. However the 1st Applicant's problem is with the fact of his removal from the position he

occupies as Pro-vice chancellor. It is his case that **THE UNIVERSITY OF GHANA** was established by an enactment Act 79 of 1961 as a corporate body. That by **SECTION 15** of the said Act, statutes may be enacted by the University Council for carrying into effect the provisions of the Act. Pursuant to this section of the Act a document titled **THE STATUTES OF THE UNIVERSITY** has been passed and is the basis of all activities of the University since August, 2004.

It is explicitly stated in the statutes **Section 7 (7)** that

"The provisions on the removal of the vice chancellor shall applv to the removal of the Pro-Vice Chancellor". Section 6 (19) sets out in detail the grounds for which, and the procedure by which, a Vice-Chancellor (or as in this case a Pro-Vice Chancellor) may be removed.

By ignoring the laid down procedure and arrogating to himself the power to remove the 1" Applicant from his position as Pro-vice chancellor, the 2nd Respondent usurped the powers reserved to the University Council. The 1st Applicant was denied his right to be heard by a competent body i.e. a committee to be set up by council, and finally that the Actions of the Vice chancellor was in flagrant violation of Article 23 of the 1992 constitution which enjoins Administrative Bodies and Officials to act fairly and reasonably and comply with the requirements imposed on them by law.
To this end therefore, the 2nd Respondent acted Ultra Vires and made his decision amenable to be quashed by certiorari.

THE DEFENCE:

In response the respondents submitted that:
'They admit that the 1st Applicant was the Pro-Vice Chancellor appointed pursuant to Section 7 of the statutes. They also admit that there are clear provisions in the statutes for the removal of Pro-Vice Chancellor which are co-terrninous with those of the Vice-Chancellor set out by Section 6(191 of the statutes.

However, the respondent submitted that **"with the overwhelming evidence against him, the 1st Applicant was properly sanctioned by the Respondents"** because;

a. "The procedure referred to in Section 6(79) of the statutes is applicable only when a person is to be removed in respect of his functions and in his capacity as Pro-vice chancellor. In the case of the applicant, the allegations of misconduct made against him were made in his capacity as a senior member of the University and not as the Pro-Vice Chancellor of the University. "Counsel submitted

that; "When one takes a look at the letter inviting him to appear before the Disciplinary Board one sees that, he was invited to respond to the allegations of misconduct in respect of the conduct of examination whose grading he interfered with, at the time he was not the examiner for that paper".

The application in respect of the 1" applicant should be therefore dismissed.

THE DECISION:

REMOVAL

I find the attempt made by counsel of the Respondent to defend the action of the Ag. Vice Chancellor with regard to the Removal of the Pro-Vice Chancellor, rather half hearted, feeble and unconvincing. Perhaps it is as well, because right away, I will say the action is not defensible. Maybe what counsel should have done was to have honourably conceded and advised his clients to go back to the drawing board. I will justify this assessment of counsel's efforts presently

Article 23 of the 1992 Constitution reads:

"Administrative Bodies and Administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a court or other tribunal

The Supreme Court had the opportunity to comment on **Article -23** oft he constitution in the case of **AWUNl v. WEST AFRICA EXAMINATION COUNCIL (2003-2004) SC GLR 471.** As to what is

meant by the phrase to **"act fairly and reasonablyJJ Kpenah J.S.C.** in his opinion said at page 489.

> "The phrase to act fairly and reasonably in my opinion necessarily imports a duty to observe the common law maxim of **AUDl ALTERAM PARTEM** and other principles of natural justice which is very much part of our jurisprudence and are implicit in the constitutional provisions in Article 23. Because I cannot contemplate how a person could be said to have acted fairly and reasonably if he did not give either notice or hearing to another who was entitled to such-notice or hearing before taking a decision which adversely affects his rights; neither can I contemplate a situation where a person could be said to have acted fairly and reasonably if he acted as a judge in his own cause, or gave a biased and perverse decision''

The facts of this case were briefly that the entire results of 13 students' were cancelled and a 3-year ban imposed on them. Their offence was that;

> 1. All thirteen candidates had been involved in some examination malpractices or irregulaties in Core Maths Paper and
> 2. Judging from a scrutiny of the answer scripts of the candidates, the council had concluded that the candidates had foreknowledge of the questions and had colluded among themselves in solving the questions.

The petitions by their headmaster and their solicitor were ignored. So they brought an action at the high court. They denied the collusion charge ... against them and said their not being asked to

make representation infringed their fundamental human rights and that the council failed to act fairly and reasonably as required by **Article 23.ofthe Constitution.**

It was argued on behalf of the council that the evidence in the scripts was so manifest that by its rules it was unnecessary for the council to invite the appellants to make any representation and that "the cancellation of examination result on good grounds does not constitute an infringement of human rights''.

The High Court upheld their Claim, the Court of Appeal reversed it and they appealed to the supreme Court. The Supreme Court held

1 "By failing to observe the rules of natural justice, i.e. the AUDI ALTERAM PATEM rule, the respondent council had contravened the appellants right to administrative justice under Article 23 of the 1992 Constitution.
Furthermore the process by which the council sought to establish the allegations made against the appellants was neither fair nor reasonable and therefore made in contravention of Article 23.. . .. "

The Supreme Court in an earlier case of ABOAGYE vs. **GHANA COMMERCIAL BANK LTD., (2001 -20021 SG GLR 797** had done more than enforce the observance of Administrative justice in terms of Articles 23 in as far as it relates to the **AUDI ALTERAM PARTEM RULE.**

The facts of this case were similar to those in the case of AWUNI, cited earlier in as far as it relates to notice of hearing.

The plaintiff, a senior manager of the G.C.B. received two queries relating to payments off 15,000 and $13,000 into the bank accounts of two customers. He answered the queries admitting that he had authorized the payments in the course of his normal duties. The bank, however took the view that the payments had been fraudulently authorized. The plaintiff was therefore suspended from work.

Three (3) levels of disciplinary boards went into this matter made various recommendations and finally he was dismissed. The three levels were Disciplinary Committee, that made recommendation to Executive Committee, which considered the report and recommendations and also made recommendation to the Disciplinary Board of the Bank i.e. the **BOARD OF THE BANK,** that also reviewed the report and recommendation and finally took the decision that the plaintiff should be dismissed, after taking notice of "the extent of the plaintiffs involvement in the malpractices at the Foreign Operations Branch

Significantly, apart from the query he was served with, the plaintiff was not invited to or given any hearing before any of the three committees or levels ,of disciplinary board!

His claim before the high court alleging breach of natural justice was upheld. The court of Appeal reversed the high court. On further appeal to the Supreme Court, the appeal was unanimously upheld. The court held that all courts and adjudicating bodies and authorities were required under **Article 19(13) of the 1992 Constitution** to give a fair hearing within a reasonable time. This is what **BAMFORD ADD0 JSC**. Said on **Article 19(13).**

> "This requires that notice of proceedings be given to the person affected by any decision of the adjudicating authority and that he be given the opportunity to defend himself. Furthermore, Article 23 says that administrative

bodies and officials shall act fairly. And acting fairly

implies the application of the rules of natural justice, which have been elevated to constitutional rights and are binding on all adjudicating and administrative bodies as well as courts and tribunals"

Later in the judgment **BAMFORD ADD0 J.S.C.** commenting on the breach of fair play contrary to the Audi Alarm Pattern rule said at **page 805.**

"In this case the administrative body trying the plaintiff, who suffered the highest and toughest sanction of dismissal, should in the course of fair trial have served him with proper disciplinary charges and given adequate notice of the date of hearing as well as be given the opportunity to be heard. The mere fact that the rules of the bank did not mention this does not relieve the defendant of the duty to comply with' the rules of natural ' justice and fair trial"

More appropriately **Adiabeng J.S.C.** also said this at **page 816**

"It is clear from rule .?:?of the Defendant bank staff rules that the Plaintiff was entitled not only to a hearing, but a personal hearing. Giving him-a query would not, by stretch of the imagination, be the same as giving him personal hearing ..."

I have referred copiously to the Supreme Court decision in the **AWUNI** and the **ABOAGYE CASES**, because even though the facts in those cases seem to be slightly different, the similarities in the issues discussed and the principles contained therein cannot be lost on the court.

While in the **AWUNI** case the applicants were not given any form of hearing at all because of what the WAEC said was due to **"Administrative convenience",** in the Aboagye case he was given a form of hearing when he was asked to respond to a query. The court in both cases said that no hearing or inadequate hearing amounted to a denial of the respective plaintiffs' right to fair hearing……..

APPENDIX 2

EXTRACTS FROM UNIVERSITY OF GHANA POLICY SOURCES

ACADEMIC BOARD MINUTES
3/2003-2004, Dated February 20, 2004

COMMITTEE TO STREAMLINE ADMISSIONS PROCEDURES

By a letter dated September 15, 2003, the Vice Chancellor empanelled a Committee to deliberate on "some outstanding issues" of the University's admissions policy and make recommendations for consideration by the Executive committee and Academic Board.

2) TERMS OF REFERENCE

The Committee had the following terms of Reference:

2) To suggest cut-off aggregates for concession admissions (Children/wards of University of Ghana staff, of other public Universities and friends of the University)

4) To examine the Affirmative action for the admission of girls being implemented and also deliberate on and make suggestions for affirmative action for candidates from disadvantaged schools;

9.0 RECCOMENDATIONS

The effective date of wards of members of staff benefiting from concessionary admissions should be reviewed from the current period of six months to two years from the date of registration to eliminate abuse.

The policy on affirmative action for female applicants should continue. A policy of affirmative action for should be implemented, on clearly stated guidelines in this report with effect from 2004-2005 academic year. Admissions of all categories should be done by the academic board.

The Board gave definite approval to the following:

Less Endowed Schools:
Affirmative action is granted to 300 applicants from Less Endowed Schools as certified by the Ghana Education Service. The Interfaculty committee was charged with the responsibility of working out the details for implementation.

The Scheme was to commence in 2004/2005, and should be reviewed after every five years of implementation.

Concessionary Admissions to Sister Universities:

Concessionary admission for sister Universities should be given on reciprocal basis. Under this agreement, admission into competitive programmes should attract two points below the cut-off point.

The effective date of wards of members of staff benefiting from concessionary admissions is reviewed from the current period of six months to two years from the date of registration, to eliminate abuse.

ACADEMIC BOARD MINUTES 3/90-91: Dated May 30th 1991.

INTERACULTY COMMITTEE TO ADVISE ON POLICY AND PLAN FOR THE DEVELOPMENT OF THE UNIVERSITY

3.1: The inter faculty committee observed the sex ratio of admission into the University currently to be about 80:20 in favor of males.

It noted that this skewed ratio could be attributed to the following:

1v) Cultural Bias against formal training of girls, particularly at the high level of education;

Early marriages and attendant maternal roles which disrupt education.

3.3 In the light of the above the University rationalization committee recommendation of a sex ratio of 50:50 will be difficult to achieve.

RECCOMMENDATION

3.4 Recognizing that girls are at a disadvantage socially and bearing in mind Dr Aggreys Dictum that if you "educate a woman and you educate a nation" there is a need to have more educated women to serve as role models in the society. We there fore recommend the following as a means of increasing female intake into the university.

1) The cut off point for admission for females into the University should be pegged at two points lower than that that fixed for males. The minimum requirement for admission should however be satisfied.

2) As a long term measure, efforts should be made through education to change society's perception of women's roles in society and thereby eliminate cultural prejudices of women.